In the Supreme Court of the United States

No. .....

77-499

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL.,

Petitioners,

vs.

HENRY J. KIRKSEY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioners pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals, Fifth Circuit en banc, made and entered in the above entitled cause on May 31, 1977.

OPINIONS DELIVERED IN COURTS BELOW

(a) *Kirksey, et al.* v. *Board of Supervisors of Hinds Co., Miss., et al.*, 402 F.Supp. 658 (S.D.Miss. 1975), a copy of which opinion is attached hereto as Appendix "A".

(b) *Kirksey, et al.* v. *Board of Supervisors of Hinds Co., Miss., et al.*, 528 F.2d 536 (5th Cir. 1976), a copy of which opinion is attached hereto as Appendix "B".

(c) *Kirksey, et al.* v. *Board of Supervisors of Hinds Co., Miss., et al.*, 554 F.2d 139 (5th Cir. 1977), a copy of which opinion is attached hereto as Appendix "C", and a copy of the Judgment therein is attached hereto as Appendix "D".

JURISDICTION

The date of the judgment sought to be reviewed herein is May 31, 1977. A timely Petition for Rehearing en banc on Behalf of Defendants-Appellees was filed by the Board of Supervisors of Hinds County, Mississippi, et al., which Petition for Rehearing was denied on July 22, 1977. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. The en banc decision of the United States Court of Appeals, Fifth Circuit, is contrary to former and subsequent decisions of the Fifth Circuit and to decisions of the United States Supreme Court including, but not limited to, *Howard* v. *Adams County Board of Supervisors,* 453 F.2d 455 (5th Cir. 1972) cert. den. 407 U.S. 925, 92 S.Ct. 2461, 32 L.Ed.2d 812 (1972); *Gilbert* v. *Sterrett,* 509 F.2d 1389 (5th Cir. 1975); *Whitcomb* v. *Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); and *David* v. *Garrison,* 553 F.2d 923 (5th Cir. 1977), and misapprehends the applicability of *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) to this case.

II. The United States Court of Appeals, Fifth Circuit, incorrectly held that the burden fell upon the Defendants to prove present equality of access, which holding by the Court of Appeals is such a departure from the accepted and usual course of judicial proceedings in redistricting cases, and so contrary to former decisions of the United States Supreme Court and to former and subsequent decisions of the Fifth Circuit, as to call for an exercise of the power of supervision of the United States Supreme Court.

III. The United States Court of Appeals, Fifth Circuit, incorrectly inferred that inequality of access flowed from the existence of economic and educational inequalities and then treated that fact inferred as the basis for a further inference, which action by the Court of Appeals was such a departure from the accepted and usual course of judicial proceedings, and contrary to former decisions of the United States Supreme Court in redistricting cases, such as *Wright* v. *Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1963) reh. denied 376 U.S. 959, 84 S.Ct. 964, 11 L.Ed.2d 977 (1964), as to call for an exercise of the power of supervision of the United States Supreme Court.

IV. The United States Court of Appeals, Fifth Circuit, failed to follow the mandates of Rule 52(a) of the Federal Rules of Civil Procedure together with decisions of the Fifth Circuit and United States Supreme Court including *White* v. *Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

V. The United States Court of Appeals, Fifth Circuit, failed to consider facts properly judicially noticed by the District Court, which action by the Court of Appeals is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the United States Supreme Court.

VI. The United States Court of Appeals, Fifth Circuit, erroneously held the court-ordered plan in this case to a stricter standard than that required of legislatively enacted plans although the United States Supreme Court has only

held a court-ordered plan to stricter standards than a legislatively enacted plan in two respects, which are (1) a court-ordered reapportionment plan for a state legislature must avoid use of multimember districts and (2) a court-ordered reapportionment plan for a state legislature must ordinarily achieve the goal of population equality with little more than de minimis variation, neither of which situations are applicable to the present case.

VII. The decision of the United States Court of Appeals, Fifth Circuit, misapprehends the proper application of *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) and *Arlington Heights* v. *Metropolitan Housing Development Corporation,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) to the facts of the present case and is contrary to the decisions of the United States Supreme Court in those two cases.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS INVOLVED IN THE CASE

U. S. CONSTITUTION amendment XIV, section 1, which reads as follows:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONSTITUTION amendment XV, which reads as follows:

> SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

STATEMENT OF THE CASE

On July 27, 1971, a complaint was filed in the United States District Court, Southern District of Mississippi, attacking the 1969 plan redistricting the five supervisors' districts of Hinds County pursuant to an order in *Smith* v. *Board of Supervisors of Hinds County,* Cause No. 4483 (R. 1). Count I of the complaint, which was later dismissed upon the Plaintiffs' motion (R. 160), alleged that the Defendants were under a duty to submit the 1969 plan to the United States Attorney General for approval under Section 5 of the Voting Rights Act of 1965. Count II alleged that the 1969 plan diluted black voting strength, and Count III alleged malapportionment under the one man, one vote rule. The necessity of determining the issues raised by Counts II and III was obviated by an Order of the District Court dated December 26, 1972 (R. 162), entered without objection by counsel representing any of the parties, which Order specifically found a good faith effort to redistrict Hinds County in 1969 pursuant to the Order in *Smith, supra;* that the five districts of Hinds County had substantially the same number of persons in each district when the 1969 plan was ordered implemented; and that subsequently population variance violative of the one-man,

one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment had developed among the districts as shown by the 1970 Census. The Board of Supervisors was directed to file within six months a new redistricting plan meeting the one-man, one-vote rule; the plaintiffs were given thirty days to file objections. The Court's Order further required that "(d) Said plan shall be formulated without regard to the race, creed, sex or national origin of any citizen of Hinds County, Mississippi."

On June 25, 1973, the Board filed a redistricting plan prepared by Comprehensive Planners, Inc. (hereinafter referred to as "CPI") (R. 176). The Plaintiffs filed objections to the plan alleging that it tended to dilute the black voting strength within the City of Jackson (R. 178). The District Court directed the parties to try to obtain certain racial data with respect to the population of the five districts (R. 279). Counsel for Plaintiffs and Defendants employed CPI to develop the racial information, which was introduced as Plaintiffs' Exhibit 29-36.

The case was tried in the District Court on August 19 and 20, 1974, wherein the proof was as follows:

CPI, a planning firm with a professional staff, has been involved in county redistricting since the first one-man, one-vote cases (R. 367, 406). All work on the 1973 Hinds County redistricting plan was done either personally by or under the supervision of Hoyt Thomas Holland, Jr., vice president of CPI in charge of special planning and political redistricting plans and a recognized expert in the field of special planning in political redistricting (R. 367-9; 402 F.Supp. at 664). Holland testified that in the preparation of the 1973 plan no consideration was given to the race, creed, sex or national origin of Hinds County citizens. CPI had been ordered by the Court and by the Board not

to take race into account in drawing the plan. Also, it is not a customary procedure to use race as one of the factors in drawing redistricting lines (R. 370). Holland emphatically stated that the 1973 plan lines were not drawn through Jackson purposely to fragment the black population of the City. As directed by Holland, the statistician and the young lady in the office, who dealt with the compilation of the population statistics and drawing the suggested lines, dealt only with total population figures and entirely disregarded any racial figures appearing in the block statistics of the census publication (R. 403-4, 428-9).

The most important consideration in the preparation of the 1973 plan was equalization of population (R. 373). As of the 1970 Census, Hinds County had 214,973 residents, making an ideal of 42,994.6 per district. Under the 1969 plan the percentage of variance for the "ideal" was as much as +18.53 [District 1] to -22.46 [District 5], while under the 1973 plan the variance from the "ideal" was only +0.48 [District 3] to -0.56 [District 5] (Ex. P-22).

CPI had prepared the 1969 plan, which the December 26, 1972, Order (R. 162), entered without objection by the Plaintiffs, specifically found was a good faith effort to redistrict Hinds County pursuant to the order in *Smith, supra*. The first consideration in drawing the 1973 plan was to accomplish the equalization of population between the districts in a manner that would least disrupt the county government (R. 380). District 4 was not changed under the 1973 plan since it was close enough to the norm (R. 383, 415). Likewise, under the 1973 plan there was no change in the boundaries in the rural areas (R. 374, 415). Population equality was achieved in the 1973 plan by adjusting the boundaries of the 1969 plan within the City of Jackson (R. 416). There were several reasons

for making the changes within the City of Jackson—one, because it is more difficult to assign voters to election districts in the rural areas and two, because official population figures were not available on split enumeration districts in rural areas whereas in the City of Jackson census bureau block figures were available in detail so that the lines could be efficiently redrawn (R. 378, 380). Efforts were made to see that the least election districts would be changed (R. 380). Under the 1973 plan only 17 election districts inside the City were disturbed (R. 386).

CPI in the 1973 plan attempted to equalize as best they could consistent with the primary object of equalization of population, the road mileage and road maintenance and bridge maintenance responsibilities of the supervisors of each district, to reasonably equalize the land area of each district, and to combine both rural and urban portions of the county in each district. These various criteria had been approved by the federal courts in the past and recognized as desirable planning objectives in redistricting plans for Mississippi counties (R. 274). The responsibilities of the supervisors were equalized as much as possible under the 1969 plan, and in discussing the 1973 plan the Board indicated that it was satisfied with the equalization of responsibilities. The tested approval of the 1969 plan's attempt to equalize the responsibility of the supervisors was one of the reasons for the decision of CPI not to change the lines outside the City of Jackson in the 1973 plan. The District Court found: ". . . [T]he Board plan does achieve the primary goal of a reapportionment plan of equality of population within constitutional guidelines, while at the same time equalizing as nearly as practical under the circumstances the important subsidiary factors of road and bridge mileage and land area, assigning to each district sub-

stantial numbers of both urban and rural residents." (402 F.Supp. at 665).

The population of Hinds County is concentrated in and around the City of Jackson, situated in the northeast corner of the county. Each district in the 1973 plan comprises a part of the City with the lines of the 1973 plan cutting across and dividing the white areas of Jackson, as well as the black, and dividing the population of Jackson, both black and white, among the five supervisors' districts (R. 179, 430). The constitutional objections to the use of long corridors reaching into and segmenting a city to achieve population balance were discussed and rejected in such cases as *Moore* v. *Leflore County Board of Election Commissioners,* 502 F.2d 621 (5th Cir. 1974) and in *Howard* v. *Adams County Board of Supervisors,* 453 F.2d 455 (5th Cir. 1972) cert. denied 407 U.S. 925, 92 S.Ct. 2461, 32 L.Ed. 2d 812 (1972). In redistricting a county with the configuration of Hinds, with its population concentration in and around the City of Jackson in the northeast corner of the county, it is proper and in fact absolutely necessary to have corridors running into Jackson from each rural land area to achieve as close as possible equalization of road mileage and land area. Clearly the lines of the districts do not offend good planning. Also Holland testified that the 1973 districts are as compact as they can be taking all five districts into account together with the primary objective of equalization of population and together with other desirable planning objectives (R. 432).

The racial statistics regarding the 1973 plan developed for the Plaintiffs and Defendants by CPI can be summarized as follows:

1969 PLAN DISTRICTS

Population

District Number	White*	Non-white*	Total**	W/NW Percent
1	32377	18564	51031	63.4/36.6
2	21940	17004	38944	56.3/43.7
3	29000	19652	48652	59.6/40.4
4	29260	13750	43010	68.9/32.0
5	17974	15362	33336	53.9/46.1
TOTAL	130551	84422	214973	60.7/39.3

1973 PLAN DISTRICTS

Population

District Number	White	Non-white*	Total**	W/NW Percent
1	30289	12695	42948	70.5/29.5
2	20077	22984	43061	46.6/53.4
3	31237	11962	43199	72.3/27.7
4	29260	13750	43010	68.0/32.0
5	19689	23066	42755	46.0/54.0
TOTAL	130552	84421	214975	60.7/39.3

(Ex. P-22)

As shown above, under the 1973 plan there are two majority black districts—Districts 2 and 5 (R. 172). District 2 has a black majority of approximately 3,000; and District 5, 3,200 (R. 172-3).

*United States Bureau of the Census, April 1, 1970, but with estimated racial distribution calculated using CPI housing survey conducted in April, 1974, in rural ED segments.

**United States Bureau of the Census, April 1, 1970.

Plaintiffs' witness, Dr. James W. Loewen, associate professor of sociology at Tougaloo College, attempted to show the voting age population by race of the districts under the 1973 plan (R. 207, 211-5). Loewen did not count the people in question, but used a method of estimating based on the census in conjunction with Exhibit P-30 (R. 216). Loewen testified that blacks make up only 34.19% of the voting age population countywide (R. 214). He then assumed that each of the five districts had exactly the same percentage of voting age blacks as shown on the countywide average. He just took the countywide percentage and applied it arbitrarily to each of the five districts (R. 249) arriving at the following estimates of black voting age population in the 1973 plan: District 1—25.3%; District 2—48.0%; District 3—23.6%; District 4—27.5%; and District 5—48.6% (R. 215). Dr. Loewen admitted that his estimates could be off as much as 2% (R. 250). In light of Loewen's admission, the District Court in its opinion properly noted that an upward variance of several percentage points would place the percentage of black in the voting age population in Districts 2 and 5 at approximately 50% of the total voting age population (402 F.Supp. at 669).

Plaintiffs' witness Gordon Henderson also testified on the question of voting age population (R. 271). Using block statistics and making these fit in the 1973 plan districts, Henderson tried to determine voting age population *inside the City of Jackson* (R. 312-22). There are no census statistics giving the population by race, 18 and over, by ED outside the City (R. 325). Henderson estimated the voting age population in Districts 2 and 5 by getting the number of people outside the city and then using the figure for the county as a whole as to the number of persons or proportion of persons 18 and over by race (R. 325-6). Henderson estimated the total voting age population of both Districts 2 and 5 to be 47%, but admitted that

his estimate was only "tolerably reliable" (R. 325-6). Henderson admitted having some problems with the data in his analysis of Districts 2 and 5 as to voting age by race—i.e., he arrived at different totals for the whole population for Districts 2 and 5 than did CPI (R. 341). The District Court stated: "[U]pward variances of several percentage points in Dr. Henderson's computations would also place the percentage voting population of blacks within District Two and District Five at approximately 50% of the total voting age population." (402 F.Supp. at 669).

There was no evidence admitted by the District Court on the question of the percentage of registered voters by race in the districts (R. 219-20, 222-4). Moreover, the District Court correctly found "that the sole reason for non-registration of blacks in Hinds County ten years after the passage of the Voting Rights Act is lack of interest or complete apathy." (402 F.Supp. at 670).

Henderson also testified about his analysis of racial voting patterns in Hinds County from which he concluded that there was racial block voting in Hinds County. Henderson's study attempted to measure the minds of the voters; however, he admitted that lack of precision of data is a problem with his study (R. 339-40). Henderson's conclusions upon careful examination must fall from their own lack of realistic factual support. There are many problems with Henderson's study. First, it did not consider at all the districts outside of the City in Hinds County. Second, the analysis of the 1971 election and the correlation analysis were even further limited to only 20 of the 77 precincts in the City of Jackson, those being ten almost totally black and ten almost totally white [97.5% or more] precincts. Clearly Henderson chose his data for the purpose of proving his point—that racial block voting existed in Hinds County. The data utilized

by Henderson is totally insufficient to prove the point. At the very least his study should have included a more representative cross-section of the districts in the County including rural districts and districts which are not predominately black or white.

Another hiatus in Mr. Henderson's finding of block voting arises from his attempt to tie the high turnout of black voters in 1971 with the running of a black candidate and the subsequent decline in turnout of black voters in the 1972 presidential election with the fact that all three candidates were white (R. 309-10). The problem comes in when again in the 1973 elections there was another marked decline in turnout in the predominately black districts even though there were ten black candidates running for office (R. 312, 344).

The District Court carefully considered the evidence presented by Plaintiffs in their attempt to support their assertion that the processes leading to nomination and election in Hinds County are not equally open to blacks. This evidence is detailed under Finding of Fact (26) of the District Court [402 F.Supp. at 670-1] and includes such things as the retention of the poll tax and literacy test by Mississippi until 1966, the designation in 1965 of Hinds County for the use of federal examiners pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973d, and the registration pursuant thereto; the testimony of Loewen as to the disproportionate educational, employment and income level and living conditions between whites and blacks in Hinds County, etc. The District Court further considered the evidence presented by the Plaintiffs in their attempt to establish a lack of responsiveness on the part of elected officials in Hinds County. This evidence is detailed under Finding of Fact (27) of the District Court [402 F.Supp. at 671] and includes such things as

systematic exclusion of blacks from jury lists in Hinds County; authorization of an ad valorem tax exemption for a racially segregated private school; levying taxes to support a dual school system in Hinds County prior to 1965, etc. The District Court found that there had been racial discrimination against blacks in Hinds County, as elsewhere, in the past. However, the District Court found that the more severe allegations of racial discrimination were years in the past. For example, the poll tax and literacy test were abolished in 1966. There was no proof that any black person had been denied the right to vote or to register to vote after the passage of the Voting Rights Act of 1965. The Hinds County and Jackson schools have been operating under court order since the mid-1960's and a dual school system in Hinds County had long since disappeared. The systematic exclusion of blacks from juries in Hinds County had ended with the decision in *Love* v. *McGee*, 297 F.Supp. 1314 (S.D.Miss. 1968). To the contrary, the District Court found the Hinds County officials willing to seek just solutions to racial problems, citing the good faith effort to redistrict Hinds County in 1969. The District Court found no Mississippi or Hinds County laws that operated to make it more difficult for blacks to participate in the electoral process and found that the proof of disproportionate education, employment and income levels or living conditions did not affect significantly the ability of blacks in Hinds County to register, vote or run for office. The District Court noted that the evidence of the Plaintiffs as to racial discrimination in the early 1960's had become remote history without any significant effect on the nomination and election process in Hinds County in 1975. The District Court found no convincing evidence that in 1975 black citizens were denied access to the political process or hindered from engaging in political activity or kept from seeking political office.

It should be noted in passing that the Plaintiffs also filed an alternative redistricting plan. Sixteen census tracts (48 enumeration districts) in Jackson contain the vast majority of the blacks in Hinds County, roughly 69% (R. 81). The heaviest black population in the City is in the downtown and somewhat northwesterly portion of the City in the shape of a boot (R. 79). Plaintiffs' alternative plan would carve two heavily black districts from totally within the City—Districts 3 and 4, being 66.47% and 68.36% black respectively (R. 146, 186; Ex. P-47, P-48). Holland reviewed the Plaintiffs' plan and testified that in his opinion it was an intentional racial gerrymander (R. 394-5). Direct evidence of intentional racial gerrymandering in the Plaintiffs' plan comes from the lips of the Plaintiffs' own witnesses. The District Court asked Henderson: "Do you subscribe to the view that a county should be redistricted along lines which delineate social and economic standing of the people in that district?" Henderson replied: "Only to the extent that race is a social characteristic under the circumstances such as we are talking about here." (R. 347).

After its extensive review of the facts, the District Court held that it had jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. §§ 1971(d) and 1973j(f). The District Court reviewed the one-man, one-vote decisions and concluded that both plans met those standards. The District Court then reviewed the cases regarding racially motivated gerrymander and dilution. The District Court found that the 1973 Board plan was not a racial gerrymander and that it did not dilute the black voting strength in Hinds County. However, the District Court found that the Plaintiffs' proposed alternate plan was an intentional gerrymander of the black voters of Hinds County. In so holding, the District Court noted that a reapportionment plan is

not required to be drawn to insure representation of any particular group of people. The District Court concluded that the 1973 Board plan satisfied all constitutional requirements as well as all requirements of federal law, and approved and adopted the 1973 Board plan and directed that it be put into effect immediately.

The Plaintiffs took a timely appeal to the United States Court of Appeals, Fifth Circuit. The panel that heard the case in an opinion handed down February 24, 1976 [528 F.2d 536] affirmed the action of the trial court. A copy of the panel decision is attached hereto as Appendix "B". Thereafter, the Fifth Circuit granted the Plaintiffs-Appellants' petition for rehearing en banc. On rehearing en banc, the Court of Appeals with three Judges dissenting reversed [554 F.2d 139], holding that the 1973 Board plan would continue in effect an existent denial of access to the political process by blacks in Hinds County. A copy of the en banc decision is attached hereto as Appendix "C". A timely petition for rehearing en banc was filed by the Defendants-Appellees, which petition for rehearing was denied by the Court on July 22, 1977.

The en banc decision of the Court of Appeals is in conflict with other decisions of the Fifth Circuit Court of Appeals, has decided an important question of federal law in a way in conflict with the applicable decisions of the United States Supreme Court, and has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. The present case is a proper case for the exercise of this Court's sound judicial discretion of review on writ of certiorari, and Petitioners' petition for writ of certiorari should be granted because there are special and important reasons therefor as shown by the following argument.

REASONS FOR GRANTING THE WRIT

I. The en banc decision of the United States Court of Appeals, Fifth Circuit, is contrary to former and subsequent decisions of the Fifth Circuit and to decisions of the United States Supreme Court including, but not limited to, Howard v. Adams County Board of Supervisors, 453 F.2d 455 (5th Cir. 1972) cert. den. 407 U.S. 925, 92 S.Ct. 2461, 32 L.Ed.2d 812 (1972); Gilbert v. Sterrett, 509 F.2d 1389 (5th Cir. 1975); Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); and David v. Garrison, 553 F.2d 923 (5th Cir. 1977), and misapprehends the applicability of United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) to this case.

The indirect, yet unmistakable, direction of the en banc court in *Kirksey, et al.* v. *Board of Supervisors of Hinds Co., Miss., et al.*, 554 F.2d 139 (5th Cir. 1977) is that the case is to be remanded to the District Court for Hinds County once more to redistrict itself so as to put into effect a racial gerrymander to assure black voters in Hinds County representation upon the Board of Supervisors, etc. in proportion to the percentage of blacks in Hinds County. This decision of the en banc court is contrary to former and subsequent decisions of the Fifth Circuit and to former decisions of the United States Supreme Court.

As stated by the Fifth Circuit in *Turner* v. *McKeithen*, 490 F.2d 191 (5th Cir. 1973):

> . . . [A] minority group is not constitutionally entitled to an apportionment structure designed to maximize its political advantage,[24] . . . 490 F.2d at 197

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[24]A minority group is not constitutionally entitled to one or more "safe" or majority districts simply because an apportionment scheme could be drawn to reach this result. See Whitcomb v. Chavis, 1971, 403 U.S. at 156-160, 91 S.Ct. at 1875, 29 L.Ed.2d at 383-385; Howard I, supra, 453 F.2d at 458. . . .

In *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455 (5th Cir. 1972) cert. denied 407 U.S. 925, 92 S.Ct. 2461, 32 L.Ed.2d 812 (1972) two black citizens of Adams County attacked a countywide redistricting plan adopted by the Board of Supervisors. Adams County is 48% black with the black population heavily concentrated in the City of Natchez. The primary goal in the revision was equality of population. Another objective was the equalization of responsibilities of each supervisor with regard to his traditional functions of highway and bridge maintenance. The realization of legitimate planning objectives required that each district consolidate urban and rural areas. See also *Moore* v. *Leflore County Board of Election Commissioners*, 502 F.2d 621 (5th Cir. 1974), wherein the Fifth Circuit held that the district court had correctly rejected the "Kellum Plan" because it failed to take into consideration legitimate planning objectives, such as equality of road mileage and land area. The plan that was developed had districts that converged in spoke-like fashion from a broad rural base into the City of Natchez dissecting the population concentration there. District 4 prior to the new plan had contained 60% of the blacks in Adams County and blacks had a 75% population majority in District 4. Under the new plan District 4 continued to have a 67% black majority. More blacks were added to Districts 3 and 1 wherein the blacks were in

a slight minority. The plaintiffs contended unconstitutional dilution basing their claim on the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs' position was that they were constitutionally entitled to have old District 4 divided into two predominantly black electoral districts since they commanded a population concentration of sufficient size and contiguity to constitute two equally apportioned districts. The Fifth Circuit rejected this theory citing *Whitcomb* v. *Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971).

In *Gilbert* v. *Sterrett*, 509 F.2d 1389 (5th Cir. 1975), a class action challenging the 1971 apportionment of the County Commissioners' districts of Dallas County, Texas, racial gerrymandering and dilution of the black voting strength was urged. A new plan was adopted in 1973, which the plaintiffs alleged failed to cure the defects in the 1971 plan. The District Court entered a judgment denying relief to the plaintiffs. The plaintiffs appealed alleging that the District Court either applied the wrong standard of law or was clearly erroneous in its findings of fact. In a two to one decision the Fifth Circuit panel affirmed, and a petition for rehearing en banc was denied. Ninety percent of the black population of Dallas County lived in the City of Dallas, and nearly all was concentrated in one part of the City. It was complained that the 1971 plan was a gerrymander as to the north-south boundary line between Districts 3 and 4. The 1973 plan straightened out the peculiarly shaped boundary line between Districts 3 and 4 in the 1971 plan. Citing *Whitcomb* v. *Chavis*, *supra*, the Fifth Circuit stated:

> . . . An apportionment scheme is not constitutionally impermissible merely because its lines are not carefully drawn to insure representation to sizeable racial, ethnic, economic or religious groups. 509 F.2d at 1391

The Fifth Circuit found that none of the findings of fact of the District Court should be set aside as clearly erroneous, citing Federal Rules of Civil Procedure 52(a). The Fifth Circuit in finding no reversible error further stated:

> What counsel for plaintiffs-appellants asked on oral argument was a remand with direction that the Commission redistrict itself once more, this time so that the majority of voters in at least one district be Blacks. That would be contrary to the settled rule that "a minority group is not constitutionally entitled to an apportionment structure designed to maximize its political advantage." Turner v. McKeithen, supra, 490 F.2d at 197. 509 F.2d at 1394

What the Fifth Circuit refused to do in *Gilbert* v. *Sterrett, supra,* is precisely what the Board of Supervisors is being required to do in the present case.

The decisions in both *Howard* v. *Adams County Board of Supervisors, supra,* and *Gilbert* v. *Sterrett, supra,* are bottomed on the decision of the United States Supreme Court in *Whitcomb* v. *Chavis, supra.* In *Whitcomb* v. *Chavis, supra,* the United States Supreme Court reversed a decision of an Indiana three judge federal court striking down in the redistricting plan for the State of Indiana the use of a multimember district for Marion County. The three judge court had held that the multimember district invidiously discriminated against the poor blacks who inhabited an area of Marion County in Indianapolis known as the "ghetto". The three judge court had found that the inhabitants of this area had distinctive substantive-law interests and held that they were unconstitutionally underrepresented because the proportion of the legislators elected from this area was less than the ghetto's proportion of the population as a whole. The United States Supreme

Court in rejecting the decision of the three judge court stated:

> Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice. . . .
>
> . . . [T]he failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls. . . .
>
> . . . The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted or without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system. 403 U.S. at 149-55, 91 S.Ct. at 1872-5, 29 L.Ed.2d at 379-82

The United States Supreme Court also went on to state:

> The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an

area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. . . . 403 U.S. at 156, 91 S.Ct. at 1875-6, 29 L.Ed.2d at 383

Whitcomb v. *Chavis*, *supra*, and its progeny clearly stand for the rule that a minority group is not entitled under the United States Constitution to one or more safe or majority districts to assure the election of minority candidates. This rule was reaffirmed by the Fifth Circuit subsequent to the decision of the en banc court in *Kirksey* [554 F.2d 139], *supra*, in *David* v. *Garrison*, 553 F.2d 923 (5th Cir. 1977), wherein the Fifth Circuit states "that no one group is constitutionally entitled to elect representatives from that group." 553 F.2d at 927. The Fifth Circuit in *David* v. *Garrison*, *supra*, further stated:

> The Court is trying to find its way in this developing area of the law. To enfranchise the diluted minority, care must be taken not to disenfranchise the majority. Any action with this result merely replaces one evil with another. . . . 553 F.2d at 928

Additionally, the majority opinion of the en banc court in *Kirksey* [554 F.2d 139], *supra*, misapprehends the applicability of *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) to the present case. The United States Supreme

Court on March 1, 1977, handed down the decision in *Carey, supra.* Judge Gee in his specially concurring opinion in *Kirksey* [554 F.2d 139], *supra*, states: "Thus, the opinion of the en banc court, indirectly but unmistakably commanding the trial court to devise and install a more partisan gerrymander in favor of Hinds County black voters so as to guarantee their proportionate representation on the county board. . . ." 554 F.2d at 155. This command is based upon a misapprehension by the en banc court of the applicability of the *Carey* case, *supra*, to the case at bar.

In *Carey, supra*, a majority of the members of the Supreme Court was in agreement only upon the narrow question of whether a State could use racial considerations in drawing lines in an effort to secure the Attorney General's approval under the Voting Rights Act. Only four members of the Supreme Court concurred in Parts II. and III. of the majority opinion. In Part IV. of the majority opinion, it was argued that regardless of whether or not the plan, which used racial considerations in drawing lines, was authorized by or was in compliance with § 5 of the Voting Rights Act, New York was free to do as it did as long as it did not violate the Constitution, especially the Fourteenth and Fifteenth Amendments. It was then argued under Point IV. that New York did not act unconstitutionally in drawing districts to enhance the opportunity for election of nonwhite representatives because there was no fencing out of the white population from participation in the political processes of the county and because the plan did not minimize or cancel out white voting strength. Only three justices concurred in Part IV. of the majority opinion, thus clearly showing that the ruling in *Carey, supra*, is not to be applied outside the limited facts of that case.

Obviously the application of the *Carey* case, *supra,* is limited to attempts by a legislative body to comply with § 5 of the Voting Rights Act and to secure approval of the Attorney General. The fact that the Voting Rights Act is broadly remedial and that the Supreme Court has reasoned in cases under § 5 of the Act that the Attorney General and state legislature would have "to think in racial terms" clearly indicates why the application of *Carey, supra,* is limited to cases under the Voting Rights Act. Moreover, as stated by Judge Hill in his dissenting opinion in *Kirksey* [554 F.2d 139], *supra*:

> . . . *United Jewish Organizations* merely holds that a state political body attempting to comply with the Congressional mandate embodied in the Voting Rights Act is not prohibited by the Constitution from considering race in establishing election lines. This is a far cry from ruling—as our court may be doing today—that the Constitution *requires* that race be consciously considered. 554 F.2d at 162

II. The United States Court of Appeals, Fifth Circuit, incorrectly held that the burden fell upon the Defendants to prove present equality of access, which holding by the Court of Appeals is such a departure from the accepted and usual course of judicial proceedings in redistricting cases, and so contrary to former decisions of the United States Supreme Court, and to former and subsequent decisions of the Fifth Circuit, as to call for an exercise of the power of supervision of the United States Supreme Court.

The en banc court in *Kirksey* [554 F.2d 139], *supra,* throughout the majority opinion, citing such cases as *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en banc) aff'd on other grounds sub nom. *East Carroll Parish School*

Bd. v. *Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), recognizes the rule that in the absence of a racially motivated gerrymander, a redistricting plan is constitutionally impermissible only if it perpetuates an existent denial of access by the racial minority to the political process. However, in spite of the requirement that the Plaintiffs prove existent denial, the en banc court rejected the District Court's requirement that the Plaintiffs come forward with evidence of existent denial. The en banc court because of evidence of past racial discrimination erroneously held that "it then fell to the defendants to come forward with evidence that enough of the incidents of the past had been removed, and the effects of past denial of access dissipated, that there was presently equality of access." 554 F.2d at 144-5. As stated by Judge Hill in his dissenting opinion:

> . . . Then, this court establishes an evidentiary rule and defaults the defendants for failing to have predicted and followed it. 554 F.2d at 162-3

In *Turner* v. *McKeithen, supra,* the Fifth Circuit stated:

> . . . therefore, "the plaintiffs' burden is to produce evidence to support findings that the political processes leading to the nomination and election are not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." White v. Regester, supra, 412 U.S. at 766, 93 S.Ct. at 2339, 37 L.Ed.2d at 324.
>
> * * *
>
> . . . Among the factors entitled to consideration are the *continuing effects* of past discrimination on the minority group's ability to participate in the political process. . . . [Emphasis added.] 490 F.2d at 194

In *David* v. *Garrison, supra,* the District Court had held unconstitutional the at-large election system of Lufkin, Texas. The United States Court of Appeals, Fifth Circuit, vacated the District Court's judgment because the District Court's factual findings were not adequate to support the finding of unconstitutionality and remanded the case for reconsideration in light of the Fifth Circuit's opinion and for the conducting of such further evidentiary hearings as deemed necessary by the District Court. The Fifth Circuit in *David, supra,* stated:

> . . . However there were no findings that, because of the past discrimination, present black participation in elections is less than effective. There were no findings that blacks were afraid to vote, or campaign, and in fact there was evidence that the turnout among black voters was unusually strong. As stated in *McGill, supra,* 535 F.2d at 281:
>
> "We reaffirm the importance of past discrimination to decisions about the dilutive effects of at-large voting schemes. The key question, however, is whether 'the existence of past discrimination in general precludes the effective participation [of blacks] in the election system' today. [citation omitted)."
>
> Without more explicit and concrete findings the general conclusion that past discrimination was presently precluding a current effective participation is unsupported. 553 F.2d at 930

Clearly the burden was on the Plaintiffs in *Kirksey, supra,* to prove that past discrimination precluded blacks from participation in the election system *today* in Hinds County. It was error to place the burden on the Defendants to show present equality of access.

In *McGill* v. *Gadsden County Commission,* 535 F.2d 277 (5th Cir. 1976) the Plaintiff challenged the at-large voting schemes for the election of County Commissioners and members of the County School Board of Gadsden County, Florida, arguing that the schemes unconstitutionally diluted the voting strength of blacks. The District Court held that the Plaintiff in the *Gadsden County Commission* case, *supra,* had failed to satisfy his legal burden as set out in the "voting dilution" cases of the United States Supreme Court and the Fifth Circuit. The Plaintiff had taken the position that in a racially polarized voting situation blacks have a more difficult time getting out their votes than whites because of education and economic disparities between blacks and whites and a history of harassment and official discrimination against blacks seeking to vote. The Defendants and the District Court found the barrier to the development of blacks as an effective political force to be apathy. The only one of the elements of dilution that the Plaintiff established was that blacks in Gadsden County had been subject to an extensive history of discrimination. While the existence of past racial discrimination is relevant, the key question, as stated in *Zimmer* v. *McKeithen, supra,* is "whether 'the existence of past discrimination in general precludes the effective participation (of blacks) in the election system' today." 535 F.2d at 281.

The Petitioners-Defendants submit that the evidentiary rule made by the en banc court was beyond its power to make in view of the cases requiring the Plaintiffs to prove existent denial of access. Moreover, the cases relied on by the Fifth Circuit as a basis for the rule are primarily school desegregation cases, which cases are so completely different from the case at bar that they cannot be applied to support the shifting of the burden to the Defendants in the present case.

III. The United States Court of Appeals, Fifth Circuit, incorrectly inferred that inequality of access flowed from the existence of economic and educational inequalities and then treated that fact inferred as the basis for a further inference, which action by the Court of Appeals was such a departure from the accepted and usual course of judicial proceedings and contrary to former decisions of the United States Supreme Court in redistricting cases, such as Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1963) reh. denied 376 U.S. 959, 84 S.Ct. 964, 11 L.Ed.2d 977 (1964), as to call for an exercise of the power of supervision of the United States Supreme Court.

The en banc court incorrectly held: "Inequality of access is an inference which flows from the existence of economic and educational inequalities." 554 F.2d at 145 The decision by the Fifth Circuit is contrary to the United States Supreme Court's decision in *Wright* v. *Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1963) reh. denied 376 U.S. 959, 84 S.Ct. 964, 11 L.Ed.2d 977 (1964) wherein the constitutionality of New York's 1961 congressional apportionment statute was being challenged. The United States Supreme Court affirmed the findings of the majority of the District Court that the appellants had failed to prove that the New York Legislature was motivated by racial considerations or drew the districts on racial lines. In so finding, the United States Supreme Court stated:

> . . . It may be true, as Judge Feinberg thought, that there was evidence which could have supported inferences that racial considerations might have moved the State Legislature, but, even if so, we agree that there also was evidence to support his finding that the contrary inference was "equally, or more, persuasive." Where there are such conflicting inferences one group of them cannot, because labelled as "prima facie proof," be treated as conclusive on the fact finder so as to deprive him of his responsibility to choose among disputed inferences. . . . 376 U.S. at 56-7, 84 S.Ct. at 605, 11 L.Ed.2d at 515-6

In addition, the en banc court in the case at bar then used the fact inferred as a springboard for further inferences. This is contrary to the often announced rule that one presumption cannot be based on another presumption and that inferences cannot be founded on inferences. As stated by the Mississippi Supreme Court in *Aultman* v. *Delchamps, Inc.*, 202 So.2d 922 (Miss. 1967):

> The error committed by the appellant consists in basing a presumption upon a presumption, which this Court has condemned. . . . 202 So.2d at 924

For one of the numerous Fifth Circuit cases to the same effect see *Old South Lines, Inc.* v. *McCuiston*, 92 F.2d 439 (5th Cir. 1937). The rule is clearly stated in the Fifth Circuit case of *Travelers Insurance Company* v. *Warrick*, 172 F.2d 516 (5th Cir. 1949) as follows:

> . . . It [a jury] may not, however, treat a fact inferred as a fact established that, in turn, can serve as the basis for a further inference and thereby spin out a chain of inferences into the realm of pure conjecture. 20 Am.Jur. 168. 172 F.2d at 519

IV. The United States Court of Appeals, Fifth Circuit, failed to follow the mandates of Rule 52(a) of the Federal Rules of Civil Procedure together with decisions of the Fifth Circuit and United States Supreme Court including White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

Rule 52(a) of the Federal Rules of Civil Procedure, which is concerned with actions tried before the court without a jury, states in part:

> . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

As stated by the authors in 9 Wright and Miller, *Federal Practice and Procedure* § 2585 (1971):

> Rule 52(a) provides that "findings of fact shall not be set aside unless clearly erroneous." Thus the findings are presumptively correct. The burden is on the appellant to persuade the reviewing court that a finding was "clearly erroneous." . . . Id. at p. 729

See also *United States* v. *Stewart*, 201 F.2d 135 (5th Cir. 1953). The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the finding aside. *Hays* v. *Morgan*, 221 F.2d 481 (5th Cir. 1955).

In *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1950) the appellant asked the Supreme Court to set aside a finding of the District Court. The Supreme Court quoted Rule 52 and stated:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. [Cases cited.] We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous." 339 U.S. at 495-6, 70 S.Ct. at 717, 94 L.Ed. at 1016

Thus, in a trial without a jury, the trial judge determines the credibility of witnesses giving oral testimony and the weight to be accorded to the testimony. *Chalk* v. *Beto*, 429 F.2d 225 (5th Cir. 1970). Moreover, as stated by the authors in 9 Wright and Miller, *Federal Practice and Procedure* § 2586 (1971):

> . . . Credibility involves more than demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence. Id. at pp. 736-7

Furthermore, the authors in 9 Wright and Miller, *Federal Practice and Procedure* § 2587 (1971) state:

> . . . In 1948, in the leading case on Rule 52(a), it [the United States Supreme Court] said that the "clearly erroneous" test is applicable to "inferences drawn from documents or undisputed facts" [Citing U.S. v. U.S. Gypsum Co., 1948, 68 S.Ct. 525, 541, 333 U.S. 364, 394, 92 L.Ed. 746.] and it has several times restated that proposition. Id. at pp. 746-7

The en banc court overlooked and failed to apply the "clearly erroneous" test to the findings of the District Court in this case. For example, the District Court in

Kirksey v. *Board of Supervisors of Hinds County,* 402 F.Supp. 658 (S.D.Miss. 1975) had found as follows:

> . . . In view of the possible variances in the computations of the voting age population in District Two and District Five, coupled with the heretofore noted inconsistencies in predicting block voting patterns in Hinds County, the Board plan offers black residents of this county, who constitute less than 40% of the total population, a realistic opportunity to elect officials of their choice, whether white or black, in two supervisors' districts and to significantly affect the election of county officials in the three remaining districts. 402 F.Supp. at 673

This finding of the District Court was not "clearly erroneous." However, the en banc court announced its disagreement with the findings of the District Court and substituted its findings of fact on this issue for that of the District Court. The action of the en banc court is contrary to other Fifth Circuit redistricting cases, including the subsequent case of *David* v. *Garrison, supra.* In *David* v. *Garrison, supra,* the Fifth Circuit noted that a decision as to dilution is based on an aggregate of the relevant factors thus calling for a weighing and balancing of those factors. The Court noted, as it had done in *Paige* v. *Gray,* 538 F.2d 1108, 1111 (5th Cir. 1976): "[t]he weighing of these factors is ordinarily a trial court function which we will not undertake initially unless the record is so clear as to permit of only one resolution." 553 F.2d at 930.

Moreover, contrary to *White* v. *Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) the en banc court in this case totally ignored the intensely local appraisal of the District Court. In *White* v. *Regester, supra,* the District Court considered the totality of the circumstances in

reaching its decision. This decision by the District Court was upheld by the United States Supreme Court, which in so doing stated:

> . . . On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise. 412 U.S. at 769-770, 93 S.Ct. at 2341, 37 L.Ed.2d at 326

V. The United States Court of Appeals, Fifth Circuit, failed to consider facts properly judicially noticed by the District Court, which action by the Court of Appeals is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the United States Supreme Court.

A district court can take judicial notice of related proceedings and records in cases before the court. *State of Florida Board of Trustees of the Internal Improvement Fund* v. *Charley Toppino & Sons, Inc.,* 514 F.2d 700 (5th Cir. 1975). Likewise, the court can take judicial notice of its own docket. *Cone Mills Corporation* v. *Hurdle,* 369 F.Supp. 426 (N.D.Miss. 1974). In *Cone, supra,* the District Court stated:

> The court will take judicial notice of its own docket and observe that literally scores of suits have been filed to either enforce or rescind advance or forward contracts for the sale and delivery of cotton fiber. 369 F.Supp. at 429

The District Court in the present case correctly judicially noticed the various cases that had put an end to racial

discrimination in the different areas urged by the Plaintiffs —i.e., systematic exclusion of blacks from juries in Hinds County. The District Court then could and did further look at its docket and observe that the Hinds County officials thereafter did not practice discrimination as shown by the fact that no further litigation took place.

Moreover, the District Court properly took judicial knowledge of facts that were commonly known. *McGill* v. *City of Laurel*, 252 Miss. 740, 173 So.2d 892 (1965). A court need not be blind to facts all others know. However, it appears in the present case that the en banc court failed to give any weight to the facts that the District Court properly took judicial knowledge of.

VI. The United States Court of Appeals, Fifth Circuit, erroneously held the court-ordered plan in this case to a stricter standard than that required of legislatively enacted plans although the United States Supreme Court has only held a court-ordered plan to stricter standards than a legislatively enacted plan in two respects, which are (1) a court-ordered reapportionment plan for a state legislature must avoid use of multimember districts and (2) a court-ordered reapportionment plan for a state legislature must ordinarily achieve the goal of population equality with little more than de minimis variation, neither of which situations are applicable to the present case.

The en banc court in *Kirksey* [554 F.2d 139], *supra*, makes the general statement [554 F.2d at 150] that a court-ordered reapportionment plan is held to higher standards than a legislatively enacted plan, citing *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) and *Chapman* v. *Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). In the *Marshall*

case, *supra*, the United States Supreme Court held that "in shaping remedial relief the District Court abused its discretion in not initially ordering a single-member reapportionment plan." 424 U.S. at 639-40, 96 S.Ct. at 1086, 47 L.Ed.2d at 299. The *Marshall* decision, *supra*, was the result of the following frequently announced rule of the Supreme Court:

> . . . We have frequently reaffirmed the *rule* that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, *single-member districts are to be preferred absent unusual circumstances.* [Emphasis added.] 424 U.S. at 639, 96 S.Ct. at 1085, 47 L.Ed.2d at 299

In the earlier case of *Chapman* v. *Meier, supra*, the Supreme Court had been met with multimember districts in a federal-court-ordered reapportionment of the North Dakota Legislature. The Supreme Court delineated what it considered to be the practical weaknesses of multimember districting plans and, following the Court's earlier mandate in *Connor* v. *Johnson*, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971), required a district court fashioning an apportionment plan to articulate reasons for departure from the Court's announced preference for single-member districts, stating: "Absent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State." 420 U.S. at 19, 95 S.Ct. at 762, 42 L.Ed.2d at 780. Likewise, in *Chapman* v. *Meier, supra*, the Supreme Court announced its policy that absent some persuasive justification a court-ordered reapportionment plan of a state legislature "must ordinarily achieve the goal of population equality with little more than de minimis variation." 420 U.S. at 27,

95 S.Ct. at 766, 42 L.Ed.2d at 784. Thus the standard espoused by the majority opinion in *Kirksey* [554 F.2d 139], *supra,* has only been applied by the United States Supreme Court to two particular aspects of a reapportionment plan, based upon specifically announced policies of the Supreme Court as to multimember districts and the goal of population equality.

In its recent pronouncement as to elections, the Supreme Court in *Connor* v. *Finch,* ..... U.S. ....., 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977) recognized that this higher standard had only been applied to court-ordered plans in two respects. The Court stated:

> . . . We have made clear that in *two important respects* a court will be held to stricter standards in accomplishing its task than will a state legislature: "[U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature *must avoid the use of multimember districts,* and, as well, *must ordinarily achieve the goal of population equality with little more than de minimis variation.*" Chapman v. Meier, 420 U.S. 1, 26-27, 42 L.Ed.2d 766, 95 S.Ct. 751. [Emphasis added.] ..... U.S. at ....., 97 S.Ct. at 1833, 52 L.Ed.2d at 473

The majority opinion in *Kirksey* [554 F.2d 139], *supra,* uses the stricter standard rule discussed above not to attack multimember districts or population equality—neither of which are an issue in the case at bar—but to attack the District Court's conclusions from the evidence as to voting age population in the various districts, as to block voting patterns, and as to the District Court's finding that blacks had a realistic opportunity to elect representatives of their choice—in other words to the weighing of evidence by the District Court. This application of *East Carroll Parish School Board* v. *Marshall, supra,* and *Chapman* v. *Meier, supra,* is an erroneous extension of the policies of the Supreme Court announced in those cases.

Again citing the *Marshall* and *Chapman* cases, *supra,* Point IV. of the majority opinion in *Kirksey* [554 F.2d 139], *supra,* holds that the District Court in the present case abused its discretion in shaping remedial relief. An abuse of discretion was found in *Marshall* and in *Chapman, supra,* because the district court, contrary to the announced rule of the Supreme Court that single-member districts were to be preferred, absent unusual circumstances, failed to justify use of multimember districts in its court-ordered plan. Furthermore, in *Chapman, supra,* the district court had failed to justify its departure from the announced policy of the Supreme Court that in court-ordered reapportionment plans the goal of population equality had to be achieved with little more than de minimis variation. However, as to the case at bar, the United States Supreme Court has never announced any policy against a district court's drawing supervisors' districts with long corridors reaching into and segmenting, without consideration as to race, both the black and white residents of a city, or against the consideration of "legitimate planning objectives" by a district court in the establishing of supervisors' districts. See *Connor* v. *Finch, supra.* To the contrary, the policy of the Fifth Circuit has been to allow such actions. *Moore* v. *Leflore County Board of Election Commissioners, supra,* and *Howard* v. *Adams County Board of Supervisors, supra.* The District Court in the present case did not abuse its discretion because it did not violate any announced rule or policy of either the United States Supreme Court or the Fifth Circuit.

VII. The decision of the United States Court of Appeals, Fifth Circuit, misapprehends the proper application of Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) and Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) to the facts of the present case and is contrary to the decisions of the United States Supreme Court in those two cases.

The United States Supreme Court in *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) and *Arlington Heights* v. *Metropolitan Housing Development Corporation,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) holds that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact", that " '[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination' ", and that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 264-5, 97 S.Ct. at 563, 50 L.Ed.2d at 464. The application of the rule announced in the two cases as it applies to election cases is discussed in *Washington* v. *Davis, supra,* as follows:

> The rule is the same in other contexts. Wright v. Rockefeller, 376 US 52, 11 L Ed 2d 512, 84 S Ct 603 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; the plaintiffs had not shown that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." Id. at 56, 58, 11 L.Ed.2d 512, 84 S.Ct. 603. 426 U.S. at 240, 96 S.Ct. at 2047-8, 48 L.Ed.2d at 607

As stated in the *Arlington Heights* case, *supra*: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465. There is direct proof in the present case that invidious discriminatory purpose was not a motivating factor in the development of the plan challenged in this suit. Mr. Holland of C.P.I., who drew the plan, testified that in the preparation of the 1973 Hinds County redistricting plan no consideration was given to race. In this C.P.I. was complying with the order by the District Court and instructions by the Board of Supervisors not to take race into account in drawing the plan. Mr. Holland emphatically testified that the 1973 plan lines were not drawn through Jackson purposely to fragment the black population in the City, but divided all of the residents of Jackson among the districts without regard to race. This division was based upon non-race-related, legitimate planning criteria—i.e., equalization of road mileage and road and bridge maintenance. The District Court found that C.P.I. prepared the plan "without regard to the race or political affiliation of the residents of the county, race being wholly disregarded as a factor in fashioning the district lines . . ." 402 F.Supp. at 667. This finding of the District Court was not attacked by the en banc court.

The en banc court misapprehended the application of the *Arlington Heights* case, *supra,* to the case at bar when it stated: "When the indicia of *Arlington Heights* for determining intent are applied to the patterns of denial of access to blacks in Hinds County, the conclusion is

not open to doubt." 554 F.2d at 148. To the contrary, as shown above, there is direct proof in the present case that invidious discriminatory purpose was not a motivating factor in the drawing of the 1973 plan.

CONCLUSION

As shown by the foregoing discussion of the reasons relied on by the Petitioners for the allowance of the writ, a review on writ of certiorari should be granted in the present case because there are special and important reasons therefor. The decision rendered by the en banc court in *Kirksey* [554 F.2d 139], *supra,* is in conflict with the former and subsequent decisions of the Fifth Circuit itself in redistricting cases as well as with decisions of the United States Supreme Court. Moreover, the en banc court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Therefore, the Petitioners respectfully pray that this Court will review the present case on writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Petitioners, hereby certify that on this, the 29th day of September, 1977, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to Frank R. Parker, Esquire, Lawyers' Committee for Civil Rights Under the Law, Suite 720, Milner Building, Jackson, Mississippi 39201, attorney of record for Respondents, and that three copies of said Petition were mailed, postage prepaid, to Jessica Silver, Esquire, Appeals Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530, attorney for the United States. I further certify that all parties required to be served have been served.

THOMAS H. WATKINS
Attorney for Petitioners

APPENDIX "A"

UNITED STATES DISTRICT COURT
Southern District of Mississippi
Jackson Division

CIVIL ACTION NO. 4939(N)

HENRY J. KIRKSEY, ET AL.,
Plaintiffs,

vs.

BOARD OF SUPERVISORS OF HINDS COUNTY, ET AL.,
Defendants.

MEMORANDUM OPINION

(Filed April 25, 1975)

FINDINGS OF FACT

(1) This action was filed on July 27, 1971, for declaratory and injunctive relief against the Hinds County Board of Supervisors, the Hinds County Election Commission, and the Hinds County Democratic Executive Committee, the named plaintiffs seeking to represent a class of persons composed of "all black citizens in Hinds County, Mississippi, who are registered voters qualified to vote for candidates for the post of county supervisor, justice of the peace, constable and other county officers elected from districts in Hinds County, Mississippi." The plaintiffs, who are black registered voters of Hinds County, alleged that the redistricting of the five supervisors' districts of Hinds County in 1969 violated their rights secured by the Fourteenth and Fifteenth Amendments to the United States Constitution and by 42 U.S.C. Sections 1971, 1973, and 1983, and that this Court had jurisdiction of their

claims pursuant to 28 U.S.C. Sections 1343, 1344, 2201 and 2202, and 42 U.S.C. Sections 1971(d) and 1973j(f).[1]

More specifically, the plaintiffs challenged the 1969 Hinds County redistricting plan on the grounds that the defendants were under a duty to submit the plan to the Attorney General of the United States under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973c, and had failed to secure the approval of the Attorney General with respect thereto (Count I); that the 1969 redistricting was a racial gerrymander drawn with the purpose and effect of diluting Black voting strength in Hinds County (Count II); and that the 1969 districts were malapportioned in violation of the one-man, one-vote rule (Count III).

(2) On August 2, 1971, after a hearing thereon, this Court denied the plaintiffs' motion for a preliminary injunction seeking to enjoin the defendants from conducting the 1971 county primary and general elections in Hinds County under this 1969 redistricting plan. Pursuant to the plaintiffs' request, a Three-Judge Court was designated on August 5, 1971, as required under Section 5 of the Voting Rights Act of 1965. On July 6, 1972, the plaintiffs moved for leave to amend their complaint to dismiss Count I, primarily to avoid the duplication brought about by the filing of a complaint by the United States seeking to enforce Section 5 objections to the 1969 redistricting plan in the case of *United States* v. *Board of Supervisors*

1. The original plaintiffs were Henry J. Kirksey, whose residence was changed from District Four to District Five under the 1969 plan, and Bennie G. Thompson and George W. Daniel, both residing in District Two before and after the 1969 plan was implemented. This Court has subsequently granted the plaintiffs' motion to amend to add three additional black voters residing in the other three supervisors' districts, and there is thus a named plaintiff residing in each of the five supervisors' districts of Hinds County. (Order dated December 27, 1972).

of Hinds County, Civil Action No. 4983 (Southern District of Mississippi). This Court granted the motion to dismiss Count I without prejudice and dissolved the Three-Judge Court, thereby leaving plaintiffs' Counts II and III for decision by a single Judge. (Order dated July 31, 1972).

(3) On December 15, 1972, a conference was held in this matter at which time counsel for both plaintiffs and defendants agreed that an order requiring the drawing of a new redistricting plan would obviate the necessity of a determination on the issues raised by Counts II and III of the complaint.

Accordingly, on December 26, 1972, this Court entered an Order, without objection by counsel representing any of the parties herein, which allowed the plaintiffs' Motion for Leave to Amend the Complaint to add additional parties as noted hereinabove; specifically found that there was in fact a good faith effort to redistrict Hinds County in 1969 pursuant to the Order of this Court in *Smith* v. *Board of Supervisors of Hinds County*, Civil Action No. 4483, decided December 19, 1969; that the five districts of Hinds County had substantially the same number of persons in each district when the redistricting plan of 1969 was ordered implemented; and that subsequent thereto a malapportionment of population or population variances violative of the one-man, one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment had developed among the five supervisors' districts as demonstrated by the 1970 census, published on March 3, 1972 by the Bureau of Census, Department of Commerce.

The defendant Board of Supervisors were therefore directed to file within six months of the date of that Order a new redistricting plan in strict accord with the requirements of the one-man, one-vote rule and the plaintiffs

were given thirty days thereafter in which to file objections thereto. This Court's Order further required that "(d) said plan shall be formulated without regard to the race, creed, sex or national origin of any citizen of Hinds County, Mississippi. (e) there shall be incorporated in said plan a description of the election districts thereunder and a designation of the voting places thereunder."

(4) On June 25, 1973, the defendant Board of Supervisors filed a redistricting plan prepared by Comprehensive Planners, Inc. pursuant to this Court's Order of December 26, 1972, and within thirty days thereafter plaintiffs filed a a timely objection to this plan. It was the plaintiffs' contention in the objections filed to this 1973 proposed redistricting plan that the plan constituted a racial gerrymander drawn with the purpose and/or effect of minimizing and canceling out black voting strength in the five Supervisors' districts of Hinds County, that the plan deprived black Hinds County voters of the two black majority districts which existed prior to 1969, and that the plan unconstitutionally fragmented and dispersed black population concentrations in the City of Jackson sufficiently populous and compact to form one or more black majority districts among all five districts, thus diluting black voting strength. The plaintiffs further contended that the proposed districts under the 1973 redistricting plan disregarded natural and geographic boundary lines and political subdivision lines, lacked compactness, preserved incumbents in their respective districts, unnecessarily altered existing precincts, and was based on discriminatory criteria unrelated to proper redistricting and constitutional guarantees.

(5) On January 22, 1974, this Court directed the parties to make efforts to obtain certain racial data with

respect to the population of the five districts in question in order to allow this Court to properly consider the merits of the objections raised by the defendants to the 1973 proposed Board plan. Pursuant to that Order, counsel for plaintiffs and defendants employed Comprehensive Planners, Inc. to develop the required information which was admitted into evidence as Plaintiffs' Exhibits 29 through 36, inclusive, at the hearing held in this matter.

(6) On August 1, 1974, after the receipt of the racial statistics provided by the defendants' planning agent showing the racial composition of each of the defendants' proposed districts, the plaintiffs filed a proposed alternative county redistricting plan which was based on "Census Tracts". The defendants contend that the plan submitted by the plaintiffs is wholly impractical and unacceptable in that it is a racially motivated gerrymander and furthermore, that it creates two relatively small districts wholly within the City of Jackson without any county road or bridge mileage included and without any effort to utilize land areas or rural and urban populations.

(7) This action was tried before the Court on August 19 and 20, 1974, the plaintiffs calling four witnesses, Henry J. Kirksey, Dr. James W. Loewen, Dr. Gordon G. Henderson, and Johnny Ross, and presenting approximately seventy documents for introduction into evidence. The defendants called one witness, Mr. Hoyt T. Holland, Jr., and presented approximately four exhibits for introduction into evidence. This Court has subsequently carefully considered the transcript of this proceeding, the exhibits introduced into evidence, and the proposed findings of fact and conclusions of law, and accompanying memoranda of law, presented by the parties in this case in support of their respective positions.

(8) The population of Hinds County, Mississippi is concentrated in and around the City of Jackson, the county seat of the First Judicial District of Hinds County and the capital of Mississippi. The remainder of the county is much less developed and populated, thus resulting in an uneven population distribution. As noted by the Fifth Circuit in the case of *Moore* v. *Leflore County Board of Election Commissioners*, 502 F.2d 621 (5th Cir. 1974), this is the situation in many areas of the South and presents an extremely complicating factor in any reapportionment equation. The case sub judice is also analogous to *Moore, supra*, in that the black population of Hinds County is most heavily concentrated in forty-eight contiguous, majority black census enumeration districts located in the center of the City of Jackson, containing 58,198 black persons, or 69% of the total black population of Hinds County. (Plaintiffs' Exhibits 37, 38). In *Moore, supra*, close to one-half of the county's blacks, one-fourth of the entire population, were concentrated in a five square mile quadrant of the county seat of the town of Greenwood.

Unlike the situation in *Moore*, however, the majority of the residents of Hinds County are white. According to the 1970 United States census, Hinds County has 214,973 residents, of whom 130,592 (60.75%) are white, 84,064 (39.10%) are black, and 317 (.15%) are of other races. The City of Jackson has 153,968 residents, of whom 92,651 (60.1%) are white, 61,063 (39.7%) are black, and 254 (0.1%) are of other races. (Plaintiffs' Exhibits 37, 38).

(9) The 1973 Hinds County redistricting plan approved by the Hinds County Board of Supervisors discloses the following with respect to the population of the five supervisors' districts prior to the preparation of the proposed plan of the defendants:

District	Jackson	Remainder	Countywide Total	%	% Variance From "Ideal"
1	39,073	11,889	50,962	23.7	+18.53
2	30,656	8,357	39,013	18.2	-09.26
3	36,145	12,507	48,652	22.6	+13.16
4	21,050	21,960	43,010	20.0	+00.04
5	27,044	6,292	33,336	15.5	-22.46
Totals	153,968	61,005	214,973	100.0	
Average			42,994.6		

(Plaintiffs' Exhibit 22, Table 1, page 5).

(10) The 1973 proposed Hinds County redistricting plan submitted by the Board further reveals that as a result of redistricting, the population of the five supervisors' districts of Hinds County would be as follows:

District	Jackson	Remainder	Total	%	% Variance From "Ideal"
1	31,059	11,889	42,948	20.0	-0.11
2	34,704	8,357	43,061	20.0	+0.15
3	30,692	12,507	43,199	20.1	+0.48
4	21,050	21,960	43,010	20.0	+0.04
5	36,463	6,292	42,755	19.9	-0.56
Totals	153,968	61,005	214,973	100.0	
Total Spread					1.04

(Plaintiffs' Exhibit 22, Table 1, page 5).

(11) The plaintiffs' proposed alternative plan submitted herein on August 1, 1974, reveals that as a result of redistricting under their plan, the population of the five supervisors' districts of Hinds County would be as follows:

District	Total Population	Population Difference From Norm	Percent Variance From Norm
1	42,002	-993	-2.31
2	43,055	+ 60	+0.14
3	43,664	+669	+1.56
4	43,329	+334	+0.78
5	42,923	- 72	-.17
Total Spread			3.87

(Plaintiffs' Exhibit 46, page 2).

(12) Thus, like the Court in *Moore, supra,* this Court has before it two separate proposed plans which divide Hinds County into five districts of practically equal population. Both plans clearly satisfy the one-man, one-vote standard established by *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the 1.04% and 3.87% variance between the largest and smallest districts in both the defendant's and plaintiffs' plans, respectively, being well within the judicially established guidelines. It is thus incumbent upon this Court to examine each plan to determine its constitutional validity, and thereafter order the implementation of one of the submitted plans, or if warranted, direct the preparation of an additional plan.

(13) Pursuant to this Court's Order of December 26, 1972, the defendant Board of Supervisors employed Comprehensive Planners, Inc. (C.P.I.) to prepare and submit

an acceptable redistricting plan for Hinds County. Comprehensive Planners is a corporation organized on April 2, 1966 at West Point, Mississippi, to provide services to public bodies in the field of political redistricting and reapportionment. Its professional staff includes specialists in urban and regional planning, urban renewal, urban design, economic and demographic research, property reevaluation, and political redistricting and apportionment. Mr. Hoyt Holland, Jr., Vice President of C.P.I. and the individual in charge of special planning in political redistricting plans, testified at the hearing held in this matter on August 19 and 20, 1974. Holland has testified before this Court in several cases concerning proposed redistricting plans, including *Howard* v. *Adams County Board of Supervisors,* Civil Action No. 1352 (decided July 20, 1971), and *Bassett* v. *Roberts,* Civil Action No. J74-135(N) (this Court having this date ordered the preparation of a new plan by the Smith County Board of Supervisors), and the Court considers him an expert in the field of special planning in political redistricting. (See Exhibit D-1).

(14) Upon receipt by C.P.I. of the contract to prepare a new redistricting plan for Hinds County, it carefully examined the 1969 plan then in effect, which it had prepared pursuant to the Order of this Court on July 18, 1969 in *Smith* v. *Hinds County Board of Supervisors,* Civil Action No. 4483, and approved by the Court on December 19, 1969. Based upon this examination, C.P.I. made the preliminary determination that the equalization of population between districts, which it considered to be of primary importance, could be satisfactorily accomplished by changes in the boundary lines within the City of Jackson, thereby preserving, so far as possible, the equalization of road and bridge mileage and land area accomplished by the 1969 plan. This would also prevent any

disturbance of existing district boundaries, voting precincts and voting places in the rural areas of the county. (Holland testimony—Trs. 373, 374, 377; Exhibit P-22, page 9).

(15) Utilizing this approach, C.P.I. was able to draft a plan with only a 1.04 per cent variance between the largest and smallest districts, as noted hereinabove, which substantially retained intact the previously existing election districts and equalized road mileage and land area. Holland testified that only seventeen election districts within the urban area of Jackson would be disturbed by the proposed Board plan, there being no proposed changes in election districts outside the City of Jackson, and two of these changes would involve only land area and not people. Additionally, he noted that under the proposed plan four election districts would be shifted from one supervisors' district to another without any change in boundary, and approximately nine other districts required minor changes in their boundaries occasioned by the expansion of the city limits of Jackson in August of 1971. (Holland testimony—Trs. 386, 387; Exhibit P-22, pages 11, 12).

(16) Holland testified that C.P.I., in the preparation of the 1973 Board plan, did not attempt to make a second survey of the road mileage but used the maps and surveys they had previously prepared for the 1969 plan. He further stated that it was his understanding from a meeting with the Board of Supervisors that there had been no substantial changes in the rural areas in any particular district between 1969 and 1973 and that the road mileage, bridge and maintenance responsibility area were satisfactory to all members of the Board. Holland noted that in attempting to equalize the responsibilities of the supervisors in regards to road and bridge maintenance, it was

necessary to consider not only the road mileage and the number of bridges, but also the types of roads and bridges contained within a particular district. He further testified that the C.P.I. staff are not experts in the road and bridge maintenance field and relied on the judgment of the supervisors on that subject, in addition to the actual road mileage and total number of bridges in attempting to equalize the responsibilities. (Holland testimony—Trs. 385).

A comparison of the new districts under the proposed Board plan with respect to road mileage, using a norm of 20%, reveals that District One has the lowest percentage of total actual mileage, 17.2%; District Two—20.5%; District Three—21.8%; District Four—20.3%; and District Five—20.2%. (Holland testimony—Trs. 285; Exhibit P-22, page 10).

The square mile area comparison of the proposed districts of the Board plan, with a norm of 20%, would be as follows: District One—15.9%; District Two—23.6%; District Three—21.1%; District Four—18.0%; and District Five—21.4%. (Exhibit P-22, page 10).

A comparison of the number of bridges contained within each of the proposed districts under the Board plan, with a norm of 55%, is as follows: District One—43%; District Two—46%; District Three—70%; District Four—46%; District Five—68%. (Exhibit P-26, page 6).

Although the plaintiffs have presented for the Court's consideration a statistical comparison of the road mileage in each district under the pre-1969 plan, the 1969 plan, and the 1973 plan, and a comparison of the land area in sqaure miles between the 1969 plan and the 1973 plan, this Court does not find the disparities presented to be of any great significance. (Exhibit P-13, page 6; Exhibit P-26, page 6). They result from the necessary considera-

tion of population equalization as the primary goal in drawing the 1973 Board plan.

Furthermore, it is clear from the evidence that the equalization of road mileage and land area has always been a legitimate concern of the Board of Supervisors in attempting to equalize responsibilities among the five districts. This Court concurs with the defendants' interpretation of the entry in Minute Book 88, page 238 (Exhibit P-45), concerning possible conversion to a county-unit system in Hinds County, that although the County Engineer would be given certain general duties in regards to the maintenance of roads and bridges in all districts, the individual members of the Board would retain supervision with respect to their particular district. (Trs. 139-142).

(17) This Court has carefully examined the Board plan prepared by C.P.I., the testimony of Holland in regard to that plan and the preparation thereof, and finds that the Board plan does achieve the primary goal of a reapportionment plan of equality of population within constitutional guidelines, while at the same time equalizing as nearly as practical under the circumstances the important subsidiary factors of road and bridge mileage and land area, assigning to each district substantial numbers of both urban and rural residents. This result is accomplished under the Board plan with a minimal disturbance or change of existing election districts and voting places.

(18) The plaintiffs are critical of the Board's proposed plan's utilization of long corridors into the City of Jackson from the rural land mass in order to achieve the required equalization of population. As noted by Holland in his testimony before this Court, it is absolutely impossible to draw five districts without splitting the urban area of Jackson into five parts and still realize the other desirable planning objectives of equalization of road and

bridge maintenance responsibilities and the substantial equalization of areas between the districts.[2]

Certainly, as the plaintiffs suggest and as has been true with other plans considered by this Court, the utilization of the long corridors into an urban area does create rather unusual looking supervisors' districts. In this case, as was true in the Adams County case, the plaintiffs have quite appropriately referred to proposed District Three as a "turkey" and proposed District Four as a "baby elephant". This Court has carefully examined these lines, however, and finds that they do follow, so far as possible, natural boundaries such as rivers, highways, railways, and other landmarks traditionally used to designate district boundaries. (Exhibit P-22, pages 13-106).

In redistricting a county with the configuration of Hinds, the vast majority of its population situated in the northeastern corner of the county in the urban area of Jackson, it was absolutely necessary and proper, in this Court's opinion, to have corridors running into Jackson from each rural land mass in order to achieve a division of population and approximate equalization of road mileage and land area. In this regard, we concur with the observation of the Court in *Moore* v. *Leflore County Board of Election Commissioners, supra,* in discussing the irregularities of the boundary lines presented by the Court approved plan therein, the Court noting: "the lines of all districts are well within the bounds of reasonable discre-

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2. The constitutional objections to the use of long corridors reaching into and segmenting a city to achieve population balance was discussed by the Fifth Circuit in *Moore* v. *Deflore County Board of Election Commissioners, supra,* the Court reaffirming its statements in *Howard* v. *Adams County Board of Supervisors, supra,* that "with its land area largely rural, and its population concentrated in one urban area, the realization of these legitimate planning objectives dictated a plan which would consolidate urban and rural areas into each district . . .". 453 F.2d at 456.

tion and do not offend good planning. The criticism that some districts are not compact because of relatively lengthy perimeters is without factual or logical support, considering the physical conditions that prevail." 361 F. Supp. at 611.

(19) Plaintiffs further criticize the proposed Board plan because it divides among the five districts of the county heavily populated black areas within the City of Jackson. The plan necessarily divides the people of the City of Jackson, both black and white, among the five districts and this was necessary, in this Court's opinion, in order to achieve equalization of population with approximate equalization of road mileage and land area. This Court finds no substantial evidence of fragmentation of any particular area within the county containing a majority of either the black or white population other than that which naturally occurred in attempting to equalize population while considering other legitimate planning objectives.

(20) Holland testified that pursuant to the December 26, 1972 Order of this Court and the specific instructions he received from the Board of Supervisors of Hinds County in that regard, he did not give any consideration to the race, creed, sex or national origin of any of the citizens of Hinds County in the preparation of the proposed 1973 Board plan. (Holland testimony—Trs. 370).

He further stated that when work was begun on the 1973 plan the statistician and staff member in his office who dealt with the compilation of the population statistics in drawing the lines was specifically instructed to "deal only with the total population figures from the computer printout sheets and other census data and to disregard entirely any racial figures whatsoever. . . ." (Holland testimony—Trs. 403, 404).

Holland testified that his first compilation of any racial data concerning the 1973 plan was in response to the Order of this Court in January, 1974, subsequent to the preparation and submission of the plan the preceding year. (Holland testimony—Trs. 389).

In computing the population of Hinds County for the purpose of devising the 1969 redistricting plan, C.P.I. did engage in actual house count in the rural areas of Hinds County and in the City of Jackson, and this procedure included different house count factors for white and nonwhite houses. Holland testified that prior to the availability of the 1970 census data the only way C.P.I. could reasonably accurately estimate population in an economically feasible manner was to use the population per household factors. (Holland testimony—Trs. 418). This witness was examined extensively concerning the utilization of this procedure in the preparation of the 1969 plan, and the Court is convinced that this procedure was the most efficient means possible of computing accurate total population percentages at that particular time. (Holland testimony—Trs. 417-423).

The record is devoid of any evidence whatsoever that the racial data compiled in order to compute the population totals was used in any manner whatsoever by C.P.I. in order to draw the 1969 plan along racial lines in order to disperse or dilute the black vote.

Based on the findings hereinabove, this Court is of the opinion that the plan prepared by C.P.I. and presented by the Hinds County Board of Supervisors to this Court for approval was devised in order to achieve population equality and approximate equalization of road and bridge mileage and land area. This Court further finds that this was accomplished without regard to race or political af-

filiation of the residents of the county, race being wholly disregarded as a factor in fashioning the district lines for both the 1969 plan and the 1973 plan.

(21) The official 1970 census of population for Mississippi indicates the following population, by race, for Hinds County and for each of the five supervisors' districts as defined by the boundaries in existence prior to the 1969 redistricting, with population reflecting 1970 statistics as reported by the United States Bureau of Census:

Hinds County	Total White	Percent White	Total Black	Percent Black	Total Other	Percent Other
	130,592	60.75	84,064	39.10	317	.15
Dist. 1	54,292	53.69	46,674	46.16	157	.16
Dist. 2	1,705	23.74	5,477	76.26	0	0
Dist. 3	1,705	31.89	3,631	67.92	10	.19
Dist. 4	37,875	62.64	22,490	37.19	99	.16
Dist. 5	35,015	85.70	5,792	14.18	51	.12

(Plaintiffs' Exhibits P-37, P-38).

As revealed by the above figures, prior to the redistricting in 1969, blacks in Hinds County comprised the majority in two supervisors' districts, Districts Two (2) and Three (3).

(22) The statistical data developed pursuant to this Court's Order of January 22, 1974, reveals the following with respect to the racial composition of the districts under the 1969 redistricting plan:

District Number	White	Non-White	Total	W/NW Percent
1	32,377	18,564	51,031	63.4/36.6
2	21,940	17,004	38,944	56.3/43.7
3	29,000	19,652	48,652	59.6/40.4
4	29,260	13,750	43,010	68.0/32.0
5	17,974	15,362	33,336	53.9/46.1
Total	130,551	84,422	214,973	60.7/39.3

(Plaintiffs' Exhibit P-30).

The racial composition of supervisors' districts under the defendants' 1973 proposed redistricting plan is as follows:

District Number	White	Non-White	Total	W/NW Percent
1	30,289	12,695	42,948	70.5/29.5
2	20,077	22,984	43,061	46.6/53.4
3	31,237	11,962	43,199	72.3/27.7
4	29,260	13,750	43,010	68.0/32.0
5	19,689	23,066	42,755	46.0/54.0
Total	130,552	84,421	214,973	60.7/39.3

(Plaintiffs' Exhibit P-30).

The above statistical breakdown of racial distribution of the population in Hinds County reveals that under the 1973 redistricting plan prepared by C.P.I., blacks are in the majority in Districts Two (2) and Five (5), whereas blacks were not in the majority in any district under the 1969 redistricting plan. The Court considers this quite a

significant factor in a county in which blacks comprise less than forty per cent of the total population of the county.

(23) It is necessary, however, for this Court to also consider the racial distribution of voting age population. Dr. James W. Loewen, Associate Professor of Sociology at Tougaloo, Mississippi, with a specialization in urban sociology, race relations, political science, and Mississippi history (see Exhibit P-53), testified that due to the heavier out-migration of adult blacks from Hinds County, the percentage of blacks in the black voting age population of the county is disproportionately less than the percentage of whites in the white voting age population. Utilizing a statistical analysis of the estimated voting age population (V.A.P.) by race, Dr. Loewen's testimony revealed that 84,064 blacks living in Hinds County, 37,988 (45.2%) are under eighteen years of age, leaving a black voting age population of 46,072, or 34.19% of the total voting age population. Of the 130,592 whites living in Hinds County, 41,895 (32.1%) are under eighteen years of age, leaving a white voting age population of 88,697, or 65.81% of the total voting age population. Thus, pursuant to Dr. Loewen's calculations, the percentage of blacks in the total voting age population of Hinds County (34.19%) is five percentage points *less* than the percentage of blacks in the total population of the county (39.10%). However, the percentage of whites in the total voting age population of Hinds County (65.81%) is five percentage points *more* than the percentage of whites in the total population (60.75%). (Loewen testimony; Exhibit P-54).

Based on these computations, the estimated voting age population of each of the defendants' proposed districts, by race, is as follows:

District	White VAP	Percent White VAP	Black VAP	Percent Black VAP
1	20,566	74.7	6,957	25.3
2	13,632	52.0	12,595	48.0
3	21,210	76.5	6,555	23.5
4	19,868	72.5	7,535	27.5
5	13,369	51.4	12,640	48.6

(Loewen testimony; Exhibit P-54).

Dr. Loewen noted on cross-examination that in computting the above statistics, he was in fact assuming that the 34.19 percentage of blacks in the total voting age population in Hinds County would be the same in each of the five districts. He further noted that because of this the percentage by districts would be only estimates but "they were very unlikely to be off more than, I would say, one or maybe two percentage points. Maybe one and a half". (Loewen testimony—Trs. 249-250). An upward variance of several percentage points, however, would place the percentage of blacks in the voting age population in Districts Two and Five at approximately fifty per cent of the total V.A.P.

Dr. Loewen's conclusion that blacks do not comprise a majority of the voting age population in any district is confirmed to some extent by the calculations of Dr. Gordon Henderson, Director of the Computer Center and Professor of Political Science at Tougaloo College, who the Court recognized as an expert in the field of political science, and more specifically political behavior and political attitudes, but not in the field of county redistricting. (Exhibit P-58). Basing his calculations upon United States Census data for Jackson city blocks and Hinds County enumeration districts, Dr. Henderson determined that the

black voting age population under the Board plan is approximately 47% of the total voting age population of defendants' proposed Districts Two and Five. (Henderson testimony—Trs. 326). He further testified that the percent of the black voting age population within the City of Jackson under the Board plan is approximately 45% in District Two and approximately 46% in District Five. (Exhibits P-61, 64).

A review of Dr. Henderson's testimony reveals that he was also necessarily required to utilize certain estimates, particularly with regard to areas outside the City of Jackson, and he noted that his determinations in regard to Districts Two and Five were "tolerably reliable". (Henderson testimony—Trs. 324-325, 326, 341, 342). Thus, upward variances of several percentage points in Dr. Henderson's computations would also place the percentage voting population of blacks within District Two and District Five at approximately 50% of the total voting age population.

(25) The plaintiffs sought, through the testimony of Dr. Loewen, to present evidence concerning the estimated voter registration by race in each of the proposed districts under the Board plan. The 1971 study by the Institute of Politics at Millsap's College on which this witness based his testimony, however, was not available for introduction at the hearing and this Court sustained the defendants' objection to his testimony. Dr. Loewen's calculations, based on the I.O.P. Study, presented by offer of proof, revealed that he estimated 41.7% and 41.2% of the voters in Districts Two and Five, respectively, were black. (Trs. 217-224). Even assuming the correctness of these calculations, the Court is of the opinion, as was found by this Court to be the case in *Howard* v. *Adams County Board of Supervisors, supra,* that the sole reason for non-

registration of blacks in Hinds County ten years after the passage of the Voting Rights Act is a lack of interest or complete apathy.

(26) Plaintiffs point out, however, that prior to the 1969 redistricting of Hinds County, blacks were in substantial majority in Districts Two and Three in total population and presumably voting age population. This fact loses a great deal of its significance, however, because of the fact that prior to 1969, District Two had a population of only 7,082 persons and District Three had a population of only 5,346 persons, whereas each of these districts should have had almost 43,000 people in order to comply with the one-man, one-vote requirement.

(27) This Court has carefully considered the evidence presented by the plaintiffs in their attempt to establish the proposition that the process leading to nomination and election are not equally open to blacks in Hinds County, including, inter alia, the fact that no black has ever been elected to the Hinds County Board of Supervisors or any other office in Hinds County (Exhibit P-24, page 32; testimony of Henry Kirksey); the retention of the poll tax as a requisite to voting in this State until 1966; the retention until 1966 by this State of a literacy test as a requisite to registration, Mississippi Constitution § 244, as amended in 1954, implemented in Mississippi Code Ann. § 3213 (1956 Recomp.); the conditioning of primary participation on adherence to party principles, and successive adoption of alleged segregation principles by party organizations; the requirement that a member of the Board of Supervisors be a resident freeholder of the district which he represents and the owner of real estate therein valued at $1500, coupled with the fact that a much larger percentage of blacks in Hinds County fall below the census poverty lines as opposed to whites, Mississippi Code

Ann. § 19-3-3 (1972); (Exh. P-3, page H-1); the designation in 1965 of Hinds County for the use of federal examiners pursuant to § 6 of the Voting Rights Act of 1965, 42 U.S.C. § 1973d, and the subsequent registration pursuant thereto; the disqualification of certain black candidates by the Hinds County Election Commission and exclusion of their names from the general election because they had voted in the August 1967 Democratic primary in violation of the 1966 Amendment to Mississippi Code Ann. § 3260 (1956 Recomp. Pocket Part), which was thereafter held unenforceable because of the failure of its submission pursuant to Section 5 of the Voting Rights Act and was subsequently objected to by the Attorney General;[3] the testimony of Dr. Loewen, based on 1970 census data, concerning the disproportionate educational, employment and income level and living conditions between whites and blacks in Hinds County, and the effect on blacks' ability to register and vote and to run as candidates for office; the allegedly high rate of block voting by whites and blacks in Hinds County; and several electoral mechanisms presently operative in elections in Hinds County, including the requirement of a majority vote as a prerequisite to party nomination and winning a special election, Mississippi Code Ann. §§ 23-3-69; 23-5-203; 23-5-197 (1972); the prohibition against single shot voting, Mississippi Code Ann. § 3110 (1956 Recomp.); and the requirement of at-large elections of county election commissioners, Mississippi Code Ann. § 23-5-3 (1972), all of which the plaintiffs contend exclude blacks from equal opportunity to participate and win elections in Hinds County.

3. Although the deposition of Mr. Pottinger, and the Exhibits thereto, was admitted into evidence for purposes of revealing grounds for the objection by the Attorney General to plans prepared by Holland in other counties in this State (Trs. 454-456), this Court sustained the objection to its introduction with regard to any objection filed by the Attorney General to the 1969 Board plan on the ground of relevancy. The 1969 plan was a court-ordered plan and did not, as will be noted hereinafter, require submission to the Attorney General for approval pursuant to Section 5 of the Voting Rights Act. Furthermore, the question of whether the plan required submission or was submitted is not before this Court, Count I of the Complaint in this case having been dismissed voluntarily by the plaintiffs. (Trs. 33-38).

(28) Furthermore, this Court has carefully considered the evidence presented by the plaintiffs in their attempt to establish a lack of responsiveness on the part of white elected officials in Hinds County, including, inter alia, the findings by this Court and others of systematic exclusion of blacks from jury lists in the First and Second Judicial Districts of Hinds County, *Love* v. *McGee,* 297 F.Supp. 1314 (S.D. Miss. 1968), *Goode* v. *Cook,* 319 F.Supp. 246 (S.D. Miss. 1969), and *Spencer* v. *State,* 247 So.2d 260 (Miss. 1970; the support and maintenance of the Board of Supervisors by tax levy of two allegedly racially segregated agricultural high schools and junior colleges within Hinds County, Hinds Junior College and Utica Junior College, and an alleged disproportionate funding of these colleges (Minute Book 55, page 277, Exh. P-45); the appointment of only white persons as members of the County Board of Public Welfare in Hinds County (Minute Book 56, page 698; Minute Book 74, page 214; Kirksey Testimony); the failure of the Board of Supervisors to provide funds for the Community Hospital for Negroes of Jackson (Minute Book 56, page 681); the authorization of an ad valorem tax exemption for Jackson Academy, Inc., an allegedly racially segregated private school maintained for the purpose of providing an alternative to the public school desegregation (Minute Book 60, pages 25-26 and passim); and the maintenance and levying of taxes in support of a dual school system in Hinds County prior to 1965 by the Board of Supervisors, in conjunction with the Hinds County Board of Education and the Board of Trustees of the

Jackson Municipal Separate School District, the Board of Education members being elected from each of the supervisors' districts and the Board of Trustees being appointed by the Jackson City Council [*United States* v. *Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965), 355 F.2d 865 (5th Cir. 1966), 419 F.2d 1211 (5th Cir. 1969), rev'd, 396 U.S. 290 (1970); 425 F.2d 1211 (5th Cir. 1970), 426 F.2d 1364 (5th Cir. 1970), 430 F.2d 368 (5th Cir. 1970), 432 F.2d 927 (5th Cir. 1970), and *U. S.* v. *Hinds County School Board*, 402 F.2d 926 (5th Cir. 1968), 417 F.2d 852 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1969), 423 F.2d 1264 (5th Cir. 1969)].

(29) Although there have been instances of racial discrimination against blacks in Hinds County in the past, they were not peculiar to Hinds County, but have existed in many counties in this State and, we venture to say, throughout the entire country. Furthermore, the evidence presented by the plaintiffs hereinabove is not new to this Court, but has been reviewed numerous times in other cases. In fact, a significant portion of the above evidence is the result of actions by this Court and other courts in this State.

One fact which this Court deems significant, however, in again reviewing this evidence, is that the vast majority of what this Court considers the more severe allegations of racial discrimination occurred a number of years ago. For example, the poll tax has been abolished in this State since 1966 and this Court doubts that many young voters are even aware that it once existed. There is absolutely no evidence in this record that any person has been denied the right to register to vote or to vote because of his race since the enactment of the Voting Rights Act in 1965. In fact, over 12,379 eligible blacks have been registered by federal examiners since October 8, 1965, according to the

testimony of Mr. Major C. McDaniel, State Supervisor, Voting Rights Program, U. S. Civil Service. (Exhibit P-21). As heretofore noted, this Court is of the opinion that the failure of any black citizen to register to vote in Hinds County at this time, is caused by a lack of interest or complete apathy on his part. The school system of Hinds County and the City of Jackson have been operating under Court order since the mid-1960's and the effects of the operation of a dual school system in Hinds County prior to that time have long since diminished or disappeared.

This Court tried the case of *Love* v. *McGee*, supra, and determined in 1968 that a prima facie case of discrimination in the jury selection process was established by the statistical data presented, which was not adequately refuted by the defendants. Subsequent to that case, however, we do not find any actions or non-actions on the part of white elected officials evidencing racial discrimination or a lack of responsiveness on their part to the economic, social or political interest of the black community. On the contrary, this Court has witnessed over the past seven years a willingness on the part of Hinds County officials to seek equitable solutions to racial problems. This is particularly true in the case sub judice, the Order entered by this Court on December 26, 1972, directing the preparation of a new plan specifically finding that there was a good faith effort to redistrict Hinds County in 1969 and that subsequent thereto, malapportionment had developed among the districts. This finding was agreed to by counsel representing the plaintiffs at that time, the only matter in dispute being the requirement of new elections after the preparation of a plan, which the Court denied.

This Court does not find that any of the electoral laws presently in effect in Hinds County or this State operate to make it more difficult for blacks to equally

participate in the electoral process. Likewise, the proof offered by the plaintiffs, in this Court's opinion, does not establish that any disproportionate educational, employment and income levels or living conditions existing at this time between whites and blacks in Hinds County has a significant effect on the ability of blacks in this county to register and vote or to run as a candidate for office.[4]

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4. This Court has carefully examined the testimony of Drs. Loewen and Henderson, together with the appropriate exhibits to their testimony concerning the existence of a pattern of racial block voting by whites and blacks in Hinds County. The plaintiffs presented persuasive evidence that such a pattern does in fact exist in Hinds County, particularly the testimony and documentary evidence of Dr. Henderson, relating to a study of the 1971 general election in this State (P-59) and his correlation analysis of the votes received by the white and black candidates in the 1971 general election in certain designated precincts within the City of Jackson. Dr. Henderson's analysis revealed that, on a correlation scale of −1.0 to +1.0, in which a correlation of +0.35 would be significant, the correlation for whites voting for white candidates is +0.979, while the correlation for blacks voting for black candidates is +0.957. (Henderson Testimony; P-65).

There does exist, however, inconsistencies and a certain incompleteness in the study and analysis made by Dr. Henderson concerning racial block voting in the entire county, thus clouding its effect on the prospects of a black candidate or a candidate favored by the black voters, winning an election in the two proposed supervisors' districts containing a majority of the total population of blacks.

Initially the study made by Dr. Henderson was limited to seventy-seven precincts within the City of Jackson, and did not include a study of any of the precincts outside the City. Furthermore, Dr. Henderson did not satisfactorily explain, in this Court's opinion, why the percentage of voter turnout in Precinct Two, one of two predominantly black districts utilized by him in his analysis, dropped or decreased from 1972 to 1973, 24.2% to 9.9%, and from 1971 to 1972, 28.7% to 24.2%, even though there was an effective choice between white and black candidates both in 1971 and in 1973. This same situation occurs with sample Precinct 20. (Henderson Testimony—Trs. 335-339).

Finally, this Court considers the fact that there was an increase in the white voter turnout in 1972 when there were three white candidates, over 1971 when there was a major black candidate, Charles Evers, and two white candidates, and yet a decrease in 1973 over 1972 in white voter turnout when there was a black and white candidate opposing each other, completely inconsistent with Dr. Henderson's block voting or racial pollerization theory. (Henderson Testimony—Trs. 342-346).

There is a point in time when past instances or examples of racial discrimination become remote—a time when a past history becomes a remote history. That time has arrived for Hinds County. The mistakes of the early 1960's and prior to that time do not, in this Court's opinion, have any significant effect on the nomination and election of Hinds County officials in 1975.

The test to be applied by this Court in determining the dilution issue is:

> "whether the plan, combined with a past history of racial discrimination and present political realities, gives minority group members 'less opportunity than . . . other residents in the district to participate in the political processes and to elect legislators of their choice,' . . . [citation omitted] . . . The rule is a judicial recognition of what common sense commands—that the effect or impact of a redistricting plan cannot be evaluated accurately when considered in isolation but only when examined against the backdrop of racial discrimination in the community, past and present." *Gilbert* v. *Sterrett*, 5th Cir., No. 74-1467 (decided March 24, 1975) (dissenting opinion).

(31) This Court finds that although there have been past instances of discrimination against blacks in Hinds County, and throughout this State, blacks are not excluded in 1975 from effective participation in the electoral system, there being no convincing evidence in this case that black citizens are denied access to the political process or hindered in any way from engaging in significant political activity, or otherwise discouraged from seeking political offices in Hinds County. Furthermore, plaintiffs have failed to prove any lack of responsiveness on the part of white elected officials, the contrary being true.

The plaintiffs have failed to prove by the convincing evidence that their voting strength will be minimized or canceled out in any way by the Board plan, in which blacks constitute a majority of the population in two districts. In view of the possible variances in the computations of the voting age population in District Two and District Five, coupled with the heretofore noted inconsistencies in predicting block voting patterns in Hinds County, the Board plan offers black residents of this county, who constitute less than 40% of the total population, a realistic opportunity to elect officials of their choice, whether white or black, in two supervisors' districts and to significantly affect the election of county officials in the three remaining districts.

(32) Plaintiffs have proposed an alternative redistricting plan which equalizes the population of Hinds County among the five proposed districts and fully complies, as heretofore noted, with the one-man, one-vote constitutional requirement. The plaintiffs' proposed districts are based exclusively on the use of census tracts as "building blocks", combining contiguous census tracts into equally populous districts. Plaintiffs contend that the advantages in utilizing census tracts in the development of a redistricting plan are as follows: tract boundaries are established cooperatively by a local committee and the Bureau of Census rather than the plaintiffs, thus preventing gerrymandering; population figures for census tracts are published by the Bureau of Census as determined by the Dicentennial Census headcount of the population, thus utilizing the best available population statistics in providing for equally populous districts; the use of census tracts aid long-range planning for social and economic development of the county because they are maintained over longer periods of time and the Bureau of Census tabulates population and social, economic and housing characteristics for each census tract; and tracts are designed to be relatively uniform with respect to population characteristics, economic status and living conditions (see Exhibits P-46, P-3).

(33) The racial composition of the supervisors' districts under the plaintiffs' proposed plan would be as follows:

Proposed District	Total Population	White	Percent White	Black	Percent Black	Others
1	42,002	35,739	85.09	6,191	14.73	
2	43,055	29,017	67.40	13,958	32.42	
3	43,664	14,601	33.44	29,002	66.47	
4	43,329	13,648	31.50	29,620	68.36	
5	42,923	37,587	87.57	5,293	12.33	
Totals	214,973	130,592	60.75	84,064	39.10	317

(Plaintiffs' Exhibit P-46, page 5).

As is readily discernible from the above statistical data, the plaintiffs' plan creates three majority white districts, Districts 1, 2 and 5, and two majority black districts, Districts 3 and 4. This result would be unchanged if the above computations were converted to show racial distribution of the voting age population (V.A.P.).

(34) This Court has carefully examined this alternative redistricting plan, prepared by the plaintiffs' attorney, Mr. Frank Parker, including the testimony of Henry J. Kirksey, the plaintiff herein, who testified in favor of the plan, although the Court determined that he was not an expert in the field of redistricting, and the testimony of Hoyt Holland, who testified for the defendants in opposition to the plan. (Trs. 135-149, 392-403).

Based upon this examination, the Court is of the opinion that the plaintiffs' plan deliberately and designedly combines those census tracts having the heaviest concentration of the black population in the City for the sole purpose of creating two safe black majority districts in Hinds County. This constitutes an intentional racial gerrymander of the black population of Hinds County and the plan is thus not constitutionally permissible.

(35) Under the plaintiffs' proposed alternative plan, Districts Three and Four are entirely within the City of Jackson and the supervisors elected therefrom would have few, if any, duties relative to the construction or maintenance of roads or bridges within their respective districts. Conversely, Districts One, Two and Five would be burdened with substantially all of the duties and responsibilities with respect to the county roads and bridges outside of the municipality. District Two, under the plaintiffs' proposed plan, would have approximately 853 miles of county maintained roads in the county, or approximately 58%. Furthermore, the plaintiffs' alternative plan would not have both urban and rural representation in Districts Three and Four, a factor this Court deems important in any redistricting plan.

Thus, although the plaintiffs' alternative plan does achieve equality of population within constitutional guidelines, it makes no attempt, and in fact wholly fails, to take into consideration or accomplish what this Court considers to be important subsidiary factors of attempting to equalize road and land area. Although the plaintiffs attempted to show that an approximate equalization of county maintained road mileage and land area among the districts is not necessary in Hinds County in order to have efficient county government, this Court is of the opinion that the plaintiffs' proof falls far short in this regard.

At the hearing held in this case on August 19 and 20, 1974, the Court reserved ruling on the admissibility of Plaintiffs' Exhibits 5, 6, 9, 10, 12, 13 and 16, presently marked for identification only. These Exhibits are hereby admitted into evidence and shall be marked accordingly.

CONCLUSIONS OF LAW

(1) This Court has jurisdiction of the parties and of the subject matter of this cause pursuant to 28 U.S.C. Section 1343 and 42 U.S.C. Sections 1971(d) and 1973(j)(f).

(2) This is a proper class action pursuant to Rule 23(a) and (b)(2), F.R.Civ.P., the plaintiff class being defined as "all black citizens in Hinds County, Mississippi, who are registered voters qualified to vote for candidates for the post of county supervisor, justice of the peace, constable, and other county officers elected from districts in Hinds County, Mississippi." The five named plaintiffs, each of whom reside in one of the five supervisors' districts of Hinds County, have standing to bring this action and fully and adequately represent the interest of the class defined hereinabove.

(3) The two redistricting plans presented to this Court dividing Hinds County into five separate districts of practically equal population clearly satisfy the arithmetical requirement of the one-man, one-vote standard established by *Reynolds* v. *Sims*, 377 U.S. 533 (1964); the 1.04 per cent and 3.87 per cent variance between the largest and smallest districts in both the Board's plan and the plaintiffs' plan, respectively, falling within the judicially established guidelines of *Abate* v. *Mundt*, 403 U.S. 182 (1971), and its progeny.

(4) In order to establish the existence of an unconstitutional reapportionment plan, in the absence of mal-

apportionment, it is necessary for the plaintiffs to maintain the burden of showing either (1) a racially motivated gerrymander, or a plan drawn along racial lines, *Wright* v. *Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964); *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455 (5th Cir. 1972), or (2) "that . . . designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns* v. *Richardson*, 384 U.S. 73, 88, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Howard* v. *Adams County Board of Supervisors, supra*; *Moore* v. *Leflore County Board of Election Commissioners*, 502 F.2d 621 (5th Cir. 1974). In other words, if plaintiffs cannot show a racial gerrymander, they must prove "that the political processes leading to nomination and election [would not be] equally open to participation by the group in question—that its members [would have] less opportunity than [would] other residents in the district to participate in the political process and to elect legislators of their choice." *White* v. *Register*, 412 U.S. 755, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314, 324 (1973). See *Turner* v. *McKeithen*, 490 F.2d 191 (5th Cir. 1974); *Moore* v. *Leflore County Board of Election Commissioners, supra.*

In *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (En Banc), the Court stated, ". . . The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." Although some of the factors discussed in *Zimmer* are applicable only to multi-member districts, certain general factors should be considered in cases where it is contended that the dilution of a racial group's voting

strength has been caused by a shifting of precinct boundaries, the Court noting:

> "where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a continuous state policy underlying the preference for [the established] districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. . . . The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Register, supra, demonstrates, however, that all these factors need not be proved in order to obtain relief." 485 F.2d at 1305; See *Robinson* v. *Commissioner's Court, Anderson County*, 505 F.2d 674 (5th Cir. 1974); *Turner* v. *McKeithen*, 490 F.2d 191, 194 (5th Cir. 1973). See also *Reese* v. *Dallas County, Ala.*, 505 F.2d 879 (5th Cir. 1974).

(5) The equalization of road mileage and land areas between the various districts in any redistricting plan are "legitimate planning objectives". *Howard* v. *Adams County Board of Supervisors, supra.* The fact that an apportionment plan may satisfy some legitimate governmental goals, however, does not immunize it from constitutional attack on the ground that more fundamental criteria is offended. *Robinson* v. *Commissioner's Court, Anderson County*, 505 F.2d 674 (5th Cir. 1974).

(6) Based upon this Court's determination that the plan prepared by C.P.I. was devised to achieve population equality and approximate equalization of road and bridge mileage and land area and that this was done without regard to the race or political affiliation of the residents

of the county, race being wholly disregarded as a factor in fashioning the district lines, this Court concludes as a matter of law that the plaintiffs have failed to meet the burden of proving that the new district boundaries were drawn by or for the defendants on racial lines or that the defendants or C.P.I. were motivated by considerations of race, creed, or national origin in creating the new districts. The plaintiffs have failed to prove a racial gerrymander in the drawing of the Board plan. *Gilbert* v. *Sterrett*, ... F.2d ....., 5th Cir. 1975 (decided March 24, 1975); *Robinson* v. *Commissioner's Court, Anderson County, supra; Moore* v. *Leflore County Board of Election Commissioners, supra*; *Howard* v. *Adams County Board of Supervisors, supra*; *Wright* v. *Rockefeller, supra.*

(7) Based on this Court's determination that although there have been instances in the past of discrimination against blacks in Hinds County and throughout the State of Mississippi, at the present time, blacks are not precluded from effective participation in the election system, there being no convincing evidence in this case that black citizens are denied access to the political and electoral process or hindered in any way from engaging in significant political activity, or otherwise discouraged from seeking political offices in Hinds County; and this Court's finding that the plaintiffs have failed to prove an unresponsiveness on the part of white elected officials to their particular interests, and that the black voting strength in Hinds County is not minimized or cancelled out by the 1973 Board plan, but on the contrary, the Board plan offers black residents of Hinds County who constitute less than 40% of the total population thereof, a realistic opportunity to elect officials of their choice, whether they be white or black, in two supervisors' districts and significantly affect the election of county officials in the three remaining

supervisors' districts, leads to the legal conclusion that black residents of Hinds County do not have less opportunity than other residents in the district to participate in the political processes and elect persons of their choice to office. Accordingly, under the circumstances of this particular case, the Board plan would not, either designedly or otherwise, operate to minimize or cancel out the voting strength of the minority black residents of Hinds County. *White* v. *Register, supra*; *Burns* v. *Richardson, supra*; *Howard* v. *Adams County Board of Supervisors, supra*; *Turner* v. *McKeithen, supra; Moore* v. *Leflore County Board of Election Commissioners, supra*; *Robinson* v. *Commissioner's Court, supra*; and *Gilbert* v. *Sterrett, supra.*

(8) On the other hand, the redistricting plan submitted by the plaintiffs herein fails to meet the basic requirements applicable to county redistricting as recognized by this Court in *Howard* v. *Adams County, supra,* and the Court in *Moore* v. *Leflore County Board of Election Commissioners, supra,* and in the Fifth Circuit's affirmance of these cases. Furthermore, the plaintiffs' proposed redistricting plan constitutes an intentional gerrymandering of the black voters in Hinds County for the sole purpose of creating two safe majority black districts to insure the election of black county officials. This is constitutionally impermissible and plaintiffs' proposed alternative plan is therefore rejected by this Court. *Wright* v. *Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964).[5]

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5. The case of *Robinson* v. *Commissioner's Court, Anderson County,* 505 F.2d 674 (5th Cir. 1974) is factually distinguishable from the case sub judice. In that case the Court did approve a plan which created a black majority district in the town of Palestine with evidently unequal rural road mileage and land area compared to the other districts.

In *Robinson,* the Court noted that the effort to obtain equalization of responsibility for rural road mileage was of recent

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(9) A reapportionment plan is not unconstitutional merely because its lines are not drawn to insure representation of a particular racial, ethnic, economic or religious group. *Whitcomb* v. *Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971). The plaintiff class, as a minority race, is not entitled to elect any specific number of representatives based on their percentage makeup of the total population.[6]

Footnote continued—

vintage in Anderson County and, in the Court's opinion, was brought about merely as "an excuse for perpetuating a governing body unrepresentative of the black citizenry." In this case, this Court has specifically found that the equalization of road mileage and land area has always been a concern and a legitimate concern of the Board of Supervisors in an attempt to equalize responsibility between the five districts. In fact, the amount of miles of county-maintained roads in the pre-1969 plan and the 1969 plan and the 1973 plan does not vary substantially between the various districts, and this Court has found that the variances occurred in order to achieve the primary goal of equalization of population.

Furthermore, the Court in *Robinson* noted that there was "no suggestion in the record that the rural precinct boundaries, which as the district court found, followed neither census district nor logical boundaries—could not easily have been adjusted to equalize population and road mileage without gerrymandering in Palestine." This Court has determined that the 1973 Board plan is not a racially motivated gerrymander and that the lines between the various districts do, in fact, recognize natural boundaries. Furthermore, the Board plan does not result in an unconstitutional fragmentation of areas of heavy black concentration in Hinds County.

Finally, the Court in *Robinson* found that the evidence was uncontradicted that the Commissioner's Court's apportionments ignored all census data regarding population distribution in making the 1973 adjustments to the 1969 plan, relying instead on voter registration statistics. This, of course, resulted in an unjustified population deviation among the precincts reaching 11%. No such deviation is present in the Board plan in this case and the evidence is uncontradicted that C.P.I. utilized proper census data in drawing the new lines for the 1973 plan.

6. In *Whitcomb* v. *Chavis, supra,* the United States Supreme Court significantly stated: "The district court's holding, although on the facts of this case limited to guaranteeing one racial group

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In the recent case of *Gilbert* v. *Sterrett,* No. 74-1467 (decided March 24, 1975), the Fifth Circuit, in affirming the district court's finding that the plan under attack therein was not racially motivated and did not operate to dilute, minimize or cancel out the voting strength of any minority group, significantly stated:

> "What counsel for plaintiffs-appellants asked on oral argument was a remand with direction that the Commission redistrict itself once more, this time so that the majority of voters in at least one district be Blacks. That would be contrary to the settled rule that 'a minority is not constitutionally entitled to an apportionment structure designed to maximize its political advantage.' Turner v. McKeithen, supra, 490 F.2d at 197."

The contention of the plaintiffs in the case sub judice, although denied, essentially is the same as that of the plaintiffs-appellants in *Gilbert, supra,* i.e., that unless a reapportionment plan is drawn so as to guarantee the election of one or more members of a minority race, commensurate with that minority's percentage makeup of the total population within a county, then there has been a racially motivated gerrymander or an unconstitutional di-

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Footnote continued—

representation, is not easily contained. It is expressive of the more general position that any group with distinctive interests must be represented in the legislative halls if it is numerous enough to command at least one seat and represents the majority living in areas sufficiently compact to constitute a single member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas."

lution of that minority's voting strength. This is contrary to the established law in this Circuit and the implementation of such a plan is not constitutionally required. See *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455, 458 (5th Cir. 1972).

(10) This Court concludes that its approval of the 1973 Board plan for Hinds County satisfies all requirements of federal law and the United States Constitution and does not require submission to the Attorney General of the United States, or approval by the United States District Court for the District of Columbia, because this Court's Order is not within the reach of Section 5 of the Voting Rights Act. *Conner* v. *Johnson*, 402 U.S. 690, 692, 91 S.Ct. 1760, 29 L.Ed.2d 268, 270 (1971); *Zimmer* v. *McKeithen*, 467 F.2d 1381 (5th Cir. 1972); *Sheffield* v. *Itawamba County Board of Supervisors*, 439 F.2d 35 (5th Cir. 1971); *Conner* v. *Board of Supervisors of Oktibbeha County, Miss.*, 334 F.Supp. 280 (N.D. Miss. 1971); *Moore* v. *Leflore County, Miss, supra.*

Accordingly, the defendants shall submit an Order, approved as to form by all counsel, approving and adopting the 1973 Board plan for the redistricting of Hinds County and directing that it be put into effect immediately.

This the 24th day of April, 1975.

/s/ Walter L. Nixon, Jr.
United States District Judge

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 75-2212

HENRY J. KIRKSEY, ET AL., Individually and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellants,

vs.

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

(Filed February 24, 1976)

Before BELL, COLEMAN and GEE, Circuit Judges.
GEE, Circuit Judge:

Plaintiffs appeal from the decree of the district court adopting and promulgating a redistricting plan for the election of county supervisors and others[1] in Hinds County, Mississippi, a central-Mississippi county and the seat of the state capital. They properly represent a class: all black registered voters of Hinds County qualified to vote

1. The supervisors' duties comprise, in main, maintenance of county roads and bridges, care of the needy, levy of county taxes, maintenance of the county courthouse and jail, planning and zoning in unincorporated county areas, and providing for public health and welfare in the county. The supervisors' districts also serve as election districts for members of the county board of education, justices of the peace and constables.

for county officers elected from its districts. Their basic complaint is that the court's plan dilutes and cancels out black voting strength for these offices. We affirm.

History of this Litigation

In 1969, pursuant to court order, the county was reapportioned to comply with the equal vote requirements of Avery v. Midland County.[2] In mid-1971 this suit attacked that plan as wanting section 5[3] clearance by the Attorney General, as diluting the black franchise, and as malapportioning the county under *Avery*. A three-judge court, convened at plaintiffs' request to consider the section 5 count, was dissolved when plaintiffs nonsuited that count. In late 1972, the district court, acting on stipulated 1970 census data and after conferring with counsel, found that in light of the 1970 data the 1969 plan clearly malapportioned the county,[4] and it ordered the defendant supervisors to submit a new plan correcting the population discrepancies, "formulated without regard to the race, creed, sex or national origin of any citizen of Hinds County. . . ."

The following June, the supervisors filed their recommended plan[5] with the district court. Plaintiffs filed timely objections and their own suggested plan, which essentially created two districts out of the black residential

2. 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968).

3. Voting Rights Act of 1965, 42 U.S.C. § 1973(c) (1970), as amended, 42 U.S.C. § 1973(c) (Supp. 1976).

4. Finding, also, however, that it was a good-faith effort to comply with the court's order and had resulted in substantial equality in districts as of December 1969, when it was implemented.

5. Prepared by independent consultants who followed, as they testified and the lower court found, the court's instruction to disregard race, etc.

bloc in Jackson and joined the remainder of the bloc to three rural districts covering the rest of the county. After a lengthy delay—slightly over a year—trial on the merits was had, and an opinion and judgment followed in April 1975. The opinion incorporated many findings of fact, summarized in significant part hereinafter, a few of which are attacked as erroneous. On the basis of these findings and its conclusions of law, the court approved the supervisors' plan, authorized and directed the supervisors to put it into effect, and rejected plaintiff's plan.

Before us plaintiffs challenge these actions of the district court and seek attorneys' fees.

The Court's Findings

The court's findings of fact are extensive and are, in the main, not disputed by plaintiffs.[6] They commence

6. Plaintiffs' factual attack is limited mainly, if not entirely, to one on ultimate facts or legal conclusions of the district court:

> [T]he District Court concluded—erroneously we believe—that plaintiffs have failed to prove that their voting strength is minimized or cancelled out "in any way" by the Board's plan, and that the Board's plan offers Hinds County Blacks a "realistic opportunity to elect officials of their choice, whether white or black, in two supervisors' districts . . ." (Mem. Op., pp. 26-27). The dispersal of the heavy Black population concentration in Jackson was justified as "necessary . . . in order to achieve equalization of population with approximate equalization of road mileage and land area" (id., p. 13). Past denials to Hinds County Blacks of equal access to the political process were considered irrelevant (id., p. 33). The court sustained the Board's 1973 redistricting plan as meeting all constitutional requirements, and rejected plaintiffs' alternative plan, based on Census tracts, as "intentional gerrymandering" to create two safe Black majority districts (id., p. 34).
>
> These latter findings, we contend, are completely inconsistent with the District Court's own findings on fragmentation of Black voting strength, are contrary to the uncontradicted and undisputed evidence in this case, are unsupported by substantial evidence, and are clearly erroneous. Rule 52(a), F.R.Civ.P.

with matters relating to the background and history of this litigation, such as the bona fide nature of the 1969 redistricting attempt, the court's directing the defendant supervisors to prepare a new plan, and the requirement that this plan be formulated without reference to race, etc. as criteria.

Hinds County is described in them as demographically and economically similar to many other areas of the South:[7] a main town or city, in and around which population is concentrated, surrounded by a less-developed and sparsely-populated hinterland. The population figures for Hinds County, by the 1970 census, are noted to be 214,973, of whom 130,590 (60.75%) are white, 84,064 (39.10%) are black, and the remaining 317 (0.15%) are of other races. For the City of Jackson, the proportions are similar: 60.1% (92,651) of its residents are white, 39.7% (61,063) are black, and 0.1% (254) are of other races.

Next, the court examines the parties' proposed plans for reapportionment and finds both clearly acceptable, the largest population variance between districts in either being less than four percent. Considering first the defendant supervisors' plan, the court found it

> does achieve the primary goal of a reapportionment plan of equality of population within constitutional guidelines, while at the same time equalizing as nearly as practical under the circumstances the important subsidiary factors of road and bridge mileage and land area, assigning to each district substantial numbers of both urban and rural residents. This result

7. *See* Moore v. Leflore County Bd., 502 F.2d 621 (5th Cir. 1974) (Greenwood, Miss.), noted in the district court's findings, and Howard v. Adams County Bd., 453 F.2d 455 (5th Cir. 1972) (Nachez, Miss.).

> is accomplished under the Board plan with a minimal disturbance or change of existing election districts and voting places.

Noting that "[t]he plaintiffs are critical of the [supervisors'] proposed plan's utilization of long corridors into the City of Jackson from the rural land mass in order to achieve the required equalization of population," the court observed that "it is absolutely impossible to draw five districts without splitting the urban area of Jackson into five parts and still realize the other desirable planning objectives of equalization of road and bridge maintenance responsibilities and the substantial equalization of areas between the districts."[8] And though "the utilization of the long corridors into an urban area does create rather unusual looking supervisors' districts," the court found that the boundary lines of the districts "do follow, so far as possible, natural boundaries such as rivers, highways, railways, and other landmarks traditionally used to designate district boundaries."

The court next considered expert testimony by the architect of the supervisors' plan that he compiled no racial data concerning the plan before drawing it and, as ordered, gave no consideration to race in his drafting of it. The court found as a fact—a finding that is not assigned as error to us—that race was "wholly disregarded" in preparation of that plan. Finally, the court set out raw population tables for the pre-1969 districts, for districts under the 1969 plan, and for the supervisors' proposed plan. These show that under the pre-1969 plan blacks held great majorities (about 76% and 68%) in two of the five districts but that these were each egregiously mal-

8. The court also found that these considerations had "always" been a legitimate concern of the supervisors. *Cf.* note 1 *supra*.

apportioned under the *Avery* rule.[9] As to the 1969 plan, the figures indicate white majorities in each of its five districts, some probably decisive (68/32) and some perhaps not (54/46), as well as serious, doubtless-invalidating malapportionment.[10] The 1973 or proposed supervisors' plan reflected proper apportionment and the following racial proportions in the general population:

District Number:	1	2	3	4	5
White %:	70.5	46.6	72.3	68.0	46.0
Nonwhite %:	29.5	53.4	27.7	32.0	54.0

The court next discussed testimony offered by an expert witness for plaintiffs about voting-age (as contrasted with general) population proportions in the county and, by extrapolation only, in the districts. By this analysis, because of the systematic departure of adult blacks from Hinds County, the black/white voting-age proportions in the county were calculated at roughly 34/66. Admittedly extrapolating on the assumption that this countywide proportion would hold roughly true for each district, the expert indicated that, as is obvious, the already commanding white majorities in Districts 1, 3 and 4 would be increased, and that the black majorities in Districts 2 and 5 would become voting-age minorities of 48% and 48.6%, respectively. The court thought that these conclusions, though subject to an uncertainty of 1 to 2% inherent in the extrapolation, were "to some extent" confirmed by calculations from census data made by another

9. One of them contained less than six thousand people and the other less than eight thousand, while another district exceeded one hundred thousand in population—the ideal being about forty-three thousand.

10. Though not so severe as under the pre-1969 plan: the largest 1969-plan district included just over 51,000 souls and the smallest, 33,336, as compared to the 43,000 ideal.

of plaintiffs' expert witnesses.[11] An offer of proof made by plaintiffs' first expert about *registered* black voters in Districts 2 and 5 placed the percentages of registered blacks at about 41% for each, though the evidence was excluded because the study from which it was drawn was not offered in evidence, a ruling to which no error is assigned.

Next reviewed by the court was a considerable list of discriminatory actions taken in the past against black voters in Hinds County and in the state generally. These include such matters as the total lack of any success by black candidates in county elections, past poll tax, literacy and property qualifications on the franchise, and so on, as well as past behavior of Hinds County supervisors indicating unresponsiveness to the black citizen: systematic exclusion of blacks from jury rolls, maintenance of discriminatory educational facilities in the county, etc., some of which had been removed by past orders of the court itself in earlier cases.[12] In this connection, however, the court noted that these practices had decreased rapidly in number and severity in recent years, and that no evidence of denial of registration on racial grounds since enactment of the 1965 Voting Rights Act appeared in the record. In view of this and of testimony about the registration of thousands of eligible blacks since 1965, the court ascribed the failure of Hinds County blacks to register to lack of interest rather than to official discouragement. On these and other considerations detailed in the record, the court found that past abuses have no current significant

11. Recognized by the court as an expert generally in political science, especially as to political behavior and attitudes, but not in county redistricting. These calculations indicated a black voting-age population in each of the two districts of about 47%.

12. *E.g.*, Love v. McGee, 297 F.Supp. 1314 (S.D.Miss. 1968) (jury service).

effect in Hinds County on black access to the political process. So concluding, the court approved the supervisors' plan as offering the 40% black segment of Hinds County's populace a realistic opportunity to elect officials of its choice in two districts and a significant voice in the other three. Plaintiffs' plan was found deliberately to create two "safe" black districts (66/33 and 68/31), both entirely urban with no significant road or bridge mileage, and thus to fail both on constitutional and practical grounds. Having so found the facts, the district court proceeded to legal conclusions which we will consider shortly. Before doing so, we turn aside to take up the suggestion of the United States as amicus curiae that the court could not implement the plan submitted by the supervisors without submitting it first to the Attorney General for section 5 clearance.

Section 5 Approval

Section 5 of the Voting Rights Act of 1965, as amended by 42 U.S.C. § 1973(c) (Supp. 1976), requires clearance from the District Court for the District of Columbia or the United States Attorney General before a state or one of its political subdivisions covered by the Act implements any standard, practice, or procedure with respect to voting different from that in effect on November 1, 1964. According to the Supreme Court in Connor v. Johnson, 402 U.S. 690, 91 S Ct. 1760, 29 L.Ed.2d 268 (1971), as interpreted by this circuit in Zimmer v. McKeithen, 467 F.2d 1381 (5th Cir. 1972), *rev'd on other grounds on rehearing en banc*, 485 F.2d 1297 (1973), section 5 applies to plans produced by political subdivisions reapportioning themselves but not to "*court ordered plans* resulting from equitable jurisdiction over adversary proceedings." *Id.* at 1383 (emphasis in original).

Amicus argues, however, that section 5 applies to court-approved plans unless they are court-*formulated*. Thus, amicus' rule would subject to section 5's prior-approval requirement those proposed plans that the court adopts as submitted but not those prepared by the court itself or those adapted from a party's suggestions with minor changes. The suggested rule is not a practical one. Under it, for example, a party is penalized[13] for submitting a plan thought by the court to be completely adequate but rewarded for the near-adequate submission that requires minor revision. And one plan embodied in a court decree is subjected to screening by the Attorney General, though another—just as fully embodied—is not. More fundamentally, plaintiffs' contention misses the point of *Connor* and *Zimmer*.

For we think it the true rule that application of section 5 turns on the source from which a plan derives its legal force: if from a state instrumentality, section 5 applies; if from a court, it does not. Here the district court instructed the county Board to develop a plan, found the plan constitutionally acceptable, and ordered its implementation.[14] Thus, the plan drew its legal force from the court and does not require section 5 clearance.

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13. In the sense that the plan must pass additional scrutiny before it can become effective.

14. Unlike Connor v. Waller, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975) (per curiam), where the Court required section 5 clearance of a court-approved plan voluntarily enacted by a state legislature. The D.C. Circuit recognized a similar distinction in Harper v. Levi, 520 F.2d 53, 72 & nn. 161, 164, 165 (D.C. Cir. 1975), which required section 5 approval of a court-ordered substitute plan adopted by a state legislature after litigation had successfully challenged the legislature's prior, voluntarily enacted plan.

Validity of the Plan Adopted

One who would offer to a district court a suggested electoral redistricting of such a county as Hinds must walk a narrow line. To begin with, the physical situation presented is inherently difficult: a rural county containing one significant metropolis, which itself encompasses a racial enclave, and a black population that must not be " 'designedly or *otherwise*' " treated so as to minimize its voting strength. Burns v. Richardson, 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376, 388 (1966) (emphasis added), *quoting* Fortson v. Dorsey, 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401, 405 (1965).[15] On the other hand, the minority " 'is not constitutionally entitled to an apportionment structure designed to maximize its political advantage.' "[16] And so it appears the designer's lines should[17] be drawn so as to avoid favoring and *must* be drawn so as not to disfavor the minority group of which the internal racial bloc is a part. Perhaps it would be prudent, he may reflect, to draw no lines at all, since their location is such a ticklish matter. But this option is all but eliminated by Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971), and its holding that multi-member districts are not favored in court-ordered plans. Lines must usually be drawn, it seems; and, at least where election districts for county supervisors are concerned, practical considerations urge that they be drawn so as to include proportionate urban and rural areas within

15. *See* cases cited note 7 *supra*.

16. Gilbert v. Sterrett, 509 F.2d 1389, 1394 (5th Cir. 1975), *quoting* Turner v. McKeithen, 490 F.2d 191, 197 (5th Cir. 1973). *See generally* Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971).

17. Perhaps "must" here also, for to favor one of two racial groups seems necessarily to disfavor the other, and each presumably has equal constitutional rights in the franchise.

each district, since the supervisors' duties are, while perhaps primarily rural-oriented,[18] far from exclusively so. Finally, of course, under *Avery* the districts must contain about the same number of people. A task indeed! One which, with the addition of only a tincture of malice or exasperation to the cloud of seemingly overlapping negatives set out above, can be cast as impossible.

Nevertheless, it is not. We recognize that it is of the essence of a court's duty to articulate the law in such a form that it can be followed. A failure to do so—especially in an area so vexed as this—leaves those who must plan and act without guidance. Worse, enunciation of impractical or conflicting principles leaves them paralyzed, unsure of the criteria by which their conduct will be measured in the event. Our most recent statement or synthesis of the principles governing this case is that of Judge Rives, quoting Judge Hill in part, to be found in his opinion for the panel majority in Gilbert v. Sterrett:

> The constitutional test actually applied by the district court was stated in its opinion as follows:
>
> > It is well established that to prove the existence of a constitutionally impermissible redisricting [sic] plan in the absence of malapportionment, plaintiffs must show (1) a racially motivated gerrymander, or a plan drawn along racial lines,[3]

3. Wright v. Rockefeller, 376 U.S. 52 [84 S.Ct. 603, 11 L.Ed.2d 512] (1964); Gomillion v. Lightfoot, 364 U.S. 339 [81 S.Ct. 125, 5 L.Ed.2d 110] (1960); Howard v. Adams County Board of Supervisors, 453 F.2d 455 (5th Cir. 1972), cert. denied 407 U.S. 925 [92 S.Ct. 2461, 32 L.Ed.2d 812] (1972).

18. *See* note 1 *supra*.

or (2) the apportionment plan would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[4]

4. Burns v. Richardson, 384 U.S. 73 [86 S.Ct. 1286, 16 L.Ed.2d 376] (1966); Howard v. Adams County Board of Supervisors, 453 F.2d 455 (5th Cir. 1972), cert. denied 407 U.S. 925 [92 S.Ct. 2461, 32 L.Ed.2d 812] (1972).

An apportionment scheme is not constitutionally impermissible merely because its lines are not carefully drawn to ensure representation to sizable racial, ethnic, economic or religious groups.[5]

5. Whitcomb v. Chavis, 403 U.S. 124 [91 S.Ct. 1858, 29 L.Ed.2d 363] (1971).

. . .

> Though stated in different language, that standard of law does not differ materially from the standard as variously stated by this Court in Zimmer v. McKeithen (*en banc*), 5 Cir. 1973, 485 F.2d 1297, 1303; Turner v. McKeithen, 5 Cir. 1973, 490 F.2d 191, 193-197; Moore v. Leflore County Board of Election Commissioners, 5 Cir. 1974, 502 F.2d 621, 623, 624; Robinson v. Commissioners Court, Anderson County, 5 Cir. 1974, 505 F.2d 674.

509 F.2d at 1390-91.

Applying these principles to this case, the rule against racial gerrymanders and plans drawn along racial lines is satisfied by the supervisors' plan. Its draftsman testified that, as instructed, he drew it without reference to race. His evidence is not disputed, and its weight is not overcome by the facial appearance of the plan. On this evidence the district court found it was drawn without reference to race, and its finding is not clearly erroneous. Plaintiffs' plan, to the contrary, obviously runs afoul of the rule and is unacceptable. As noted above, it creates two voting districts, neither with significant road or bridge mileage or rural population, out of the core of the black population concentration in Jackson. Whether or not it is, as the court below found, a racial gerrymander, it is plainly drawn along racial lines alone and is obviously designed to secure two of five seats for the minority enclave while conceding three "safe" seats to the white majority.

It remains to determine whether the supervisors' plan approved by the court below, though not by design, *otherwise*—that is, unintentionally—operates to minimize minority voting power in an impermissible way. To determine whether that power is minimized, we must first ascertain its proper or natural magnitude, its expectable effect under normal conditions when neither weakened nor enhanced. And this is simply stated: in an infinite series of elections, any 35% of the electorate should elect 35% of the candidates whom it favors or, in other words, it should receive proportionate representation. As applied to any hypothetical five-man board, then, our 35% voting bloc should be represented by two out of five officials favored by it about three-fourths of the time and by only one the other fourth. This model illustrates its normal voting strength.

Plaintiffs are correct when they insist that we consider whether the impact of the black vote in Hinds County is diminished by the proposed plan. Where they err is in their selected model against which diminishment is to be measured. Plaintiffs focus on preserving intact the black geographical cluster in northern and central Jackson and would have us determine diminishment by inquiring merely whether the proposed district lines divide it. But of course they do. Any likely division of the county would

do so except one drawn on racial lines with the purpose of securing safe "black" or "white" seats on the board of supervisors. Plaintiffs' focus is too narrow, their approach too mechanical, at this stage of the inquiry. There being no intended gerrymander, the proper present focus of inquiry is not a map area[19] but the voting power of the entire black populace of Hinds County, and the model against which its claimed diminishment must be measured is, as indicated above, the number of seats on the board proportionate to that population's percentage of the whole.

So tested, the conclusion of the district court stands firm that

> the black voting strength in Hinds County is not minimized or cancelled out by the 1973 Board plan, but on the contrary, the Board plan offers black residents of Hinds County, who constitute less than 40% of the total population thereof, a realistic opportunity to elect officials of their choice, whether they be white or black, in two supervisor's districts and significantly affect the election of county officials in the three remaining supervisors' districts . . . .[20]

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19. Of course, the unusual shapes of the proposed districts are important. But the shapes are chiefly relevant to the question of whether the plan is a racial gerrymander. Once we accept the district court's unchallenged findings that the plan was drawn without reference to race and that the districts reasonably follow natural boundaries, *see* p. 5 *supra*, the significance of the geographic shapes is almost exhausted. They may, for example, indicate nothing more than a *political* gerrymander, an inhabitant of the thicket at present out of season to courts. *See* Jimenez v. Hidalgo County Water Imp. Dist. No. 2, 68 F.R.D. 668, 672-75 (S.D. Tex. 1975).

20. This is not to say that other arrangements giving fair effect to a 35% share of the electoral power might not be equally acceptable. As we noted in Turner v. McKeithen, 490 F.2d 191, 197 n.24 (5th Cir. 1973):

(Continued on following page)

In so holding, we are especially mindful of the unusual deference our court has been accustomed to accord the trial court's local perspective in such matters[21] and of the results and general course of reasoning in our factually similar recent cases of Gilbert v. Sterrett, quoted *supra*, Robinson v. Commissioner's Court, *supra* note 21, Moore v. Leflore County Board, 502 F.2d 621 (5th Cir. 1974), and Howard v. Adams County Board, 453 F.2d 455 (5th Cir. 1972). Finally, we caution drafters of redistricting plans against the temptation to deliberate division along racial lines, geographic or proportional. This is not what we here approve. What we do approve is the preparation of plans honestly devised on nonracial and rational criteria that, when tested against proportional norms, deny to no group an equal access to the political process or a fair chance to realize its full voting potential—even one based on the irrelevant criterion of race.

Plaintiffs not having prevailed, they are not entitled to attorneys' fees. *See* Sapp v. Renfroe, 511 F.2d 172, 178 (5th Cir. 1975).

AFFIRMED.

Footnote continued—

> There is no agreement on whether the political interests of a minority group are best maximized by an overwhelming majority in a single district, bare majorities in more than one district or a substantial proportion of the voters in a number of districts. See, e.g., Wright v. Rockefeller, 1964, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512.

21. Robinson v. Commissioner's Court, 505 F.2d 674, 679 (1974); *cf.* White v. Regester, 412 U.S. 755, 769; 93 S.Ct. 2332, 2341; 37 L.Ed.2d 314, 326 (1973).

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 75-2212

HENRY J. KIRKSEY, et al., individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

vs.

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

(Filed May 31, 1977)

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

GODBOLD, Circuit Judge:

This case concerns the establishment by a court-ordered plan of voting districts for the election of county officers elected by single-member districts in Hinds County, Mississippi.[1] Hinds County is the situs of Jackson, the state capital.

*Because of illness Judges Wisdom and Thornberry did not participate in the hearing or in the consideration of this case.

1. Members of the Board of Supervisors (the county governing body), justices of the peace, constables, and members of the county Board of Education.

In 1975 the district court approved and adopted a redistricting plan proposed by the county Board of Supervisors.[2] Plaintiffs appealed, and this court affirmed.[3] We granted the petition of plaintiffs for rehearing en banc and heard oral arguments. The court en banc reverses the panel decision, reverses the district court, and remands the case for further consideration.

The facts are extensively discussed in the opinions of the district court and the panel of this court. Only a summary is necessary.

In 1969 Hinds County's electoral districts were reapportioned under court order to bring them in line with the "one-man, one-vote" requirements of *Avery* v. *Midland County*, 390 U.S. 474, 20 L.Ed.2d 45 (1968). In 1971 this suit was filed as a class action on behalf of black registered voters qualified to vote for the county officers elected by districts. Plaintiffs challenged the 1969 apportionment plan on the grounds that it lacked Justice Department preclearance required by § 5 of the Voting Rights Act,[4] unconstitutionally diluted the voting strength of black citizens of Hinds County and malapportioned the county in terms of one-man, one-vote requirements.[5]

The results of the 1970 census became available and they revealed that the 1969 plan malapportioned the county. The district judge ordered the county supervisors to submit a plan of reapportionment, drawn up without

2. Kirksey v. Board of Supervisors of Hinds County, 402 F.Supp. 658 (S.D.Miss., 1975).

3. Kirksey v. Board of Supervisors of Hinds County, 528 F.2d 536 (CA5, 1976).

4. 42 U.S.C. § 1973c.

5. A three-judge court was convened as required by the Voting Rights Act. Plaintiffs dismissed their claims arising under this Act. The three-judge court was dissolved, leaving the plaintiffs' constitutional claims to be heard by a single judge.

regard to race, which created districts equal in population. In 1973 the supervisors submitted a plan prepared by a firm which provides services to public bodies in the field of political redistricting and reapportionment. The plan divided the county into five single-member supervisors' districts of almost equal population. Each district was a long corridor radiating outward from the City of Jackson, broader in the rural land mass perimeter, narrower in the Jackson urban area.

The rural district lines of the 1969 plan were retained, and redistricting was carried out by altering lines within the City. The black community of Hinds County is largely concentrated in the central city area of Jackson. Each corridor cuts into this concentrated black area. Under the plan there would be two Districts, 2 and 5, with black population majorities of 53.4% and 54%, but with smaller percentages of blacks considered on the basis of voting age population.

The general population of the county is 214,973 persons, 60.75% white, 39.10% black. Sixty-nine per cent of the blacks in the county reside in the central city area of Jackson in 48 contiguous census enumeration districts. Of the 63,267 persons residing in these census districts, 58,198, or 92%, are black. The racial distribution of general population and voting age population of the county is:

District	General population		Voting age population	
	White	Black	White	Black
1	70.5%	29.5%	74.7%	25.3%
2	46.6%	53.4%	52%	48%
3	72.3%	27.7%	76.5%	23.5%
4	68%	32%	72.5%	27.5%
5	46%	54%	51.4%	48.6%

These voting age population figures are from the testimony of witness Dr. Loewen. Another witness, Dr. Henderson, approximated the percentage of black voting age population in District 2 to be 45% and District 5 to be 46%.

The plaintiffs challenged the plan, objecting to both its purpose and its effect, and offered their own plan as a substitute.[6] The district court required that it be furnished statistical data showing the racial composition of the districts. After receiving this data the court conducted an evidentiary hearing in August 1974. The vice-president of the firm which prepared the supervisors' plan testified that pursuant to the order of the court requiring the supervisors to present a plan and in accordance with specific instructions of the supervisors to his firm, the plan was drawn in a racially neutral manner. 402 F.Supp. 666-67. The court found that:

> The plan . . . was devised in order to achieve population equality and approximate equalization of road and bridge mileage and land area. This Court further finds that this was accomplished without regard to race or political affiliation of the residents of the county, race being wholly disregarded as a factor in fashioning the district lines for both the 1969 plan and the 1973 plan.

Id. at 667. In its conclusions of law the district court held that plaintiffs had failed to meet the burden of proving that the new district boundaries were drawn by or for the defendants on racial lines or of proving that the defen-

6. The U.S. Department of Justice as amicus curiae originally challenged the 1973 plan on the ground that it lacked § 5 pre-clearance. However, both the plaintiffs and the Department of Justice now concede that under the authority of East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 47 L.Ed.2d 296 (1976), a court-ordered reapportionment plan is not subject to the clearance requirements contained in 42 U.S.C. § 1973c.

dants or the draftsman of the plan was motivated by considerations of race, creed, or national origin in creating the new districts.

The court approved and adopted the supervisors' plan and directed that it be put into effect. It rejected plaintiffs' alternate plan. On appeal this court, through its panel decision, 528 F.2d 536, affirmed the district court. The court en banc reverses the district court on both constitutional and non-constitutional grounds and remands the case to the district court for the fashioning of a remedy.

1. The law of unconstitutional reapportionment

American citizens are entitled to participate fully and effectively in the political processes of state legislative bodies.

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Reynolds v. *Sims*, 377 U.S. 533, 565, 12 L.Ed.2d 506, 529 (1964). The same principles apply to county bodies. As the Supreme Court said in *Avery* v. *Midland County, supra*:

> When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process. If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population.

390 U.S. at 480, 20 L.Ed.2d at 51.

However, redistricting done to comply with one-man, one-vote requirements may impinge upon the right of members of minorities to legal access to the processes of democracy. A redistricting plan is constitutionally impermissible as racially discriminatory if it is a racially motivated gerrymander or if it perpetuates an existent denial of access by the racial minority to the political process.[7] With respect to whether in the affected area a racial minority is denied full and effective access to the democratic process:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

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7. Zimmer v. McKeithen, 485 F.2d 1297, 1304 (CA5, 1973) (en banc), *aff'd on other grounds sub nom.* East Carrol Parish School Bd. v. Marshall, *424* U.S. *636*, 47 L.Ed.2d 296 (1976); Robinson v. Commissioners Court, 505 F.2d 674, 677 (CA5, 1974); Moore v. Leflore County Bd. of Election Commissioners, 502 F.2d 621, 623-24 (CA5, 1974).

White v. *Regester*, 412 U.S. 755, 766, 37 L.Ed.2d 314, 324 (1973). As a matter of pure semantics it can be argued that a minority is denied equality of access to the political process if it does not have representation in proportion to its voting strength. With anything less its strength is minimized, cancelled out, or "diluted." The Supreme Court and this circuit have consistently eschewed such a mechanistic approach.[8] "[C]learly it is not enough to prove mere disparity between the number of minority residents and the number of minority representatives." *Zimmer* v. *McKeithen*, 485 F.2d 1297 at 1305 (CA5, 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 47 L.Ed.2d 296 (1976).[9]

We noted in *Zimmer*, 485 F.2d at 1305, that the Supreme Court in *White* v. *Regester* had identified several factors indicative of denial of access to the political process. Among these are: a history of official racial discrimination which touched the right of the minority to register and vote and to participate in the democratic process, 412 U.S. at 766, 37 L.Ed.2d at 325; a historical pattern of a disproportionately low number of minority group members being elected to the legislative body, *id.*; a lack of responsiveness on the part of elected officials to the needs of the minority community, 412 U.S. at 769, 37 L.Ed.2d at 325-26; a depressed socio-economic status which makes participation

8. White v. Regester, 412 U.S. 755, 765, 37 L.Ed.2d 314, 324 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149, 29 L.Ed.2d 363, 379 (1971); Zimmer v. McKeithen, *supra*, 485 F.2d at 1305.

9. The recent Supreme Court decision in Beer v. U.S., 425 U.S. 130, 47 L.Ed.2d 629 (1976), is not to the contrary. The Court's remarks on proportionality as a prime measure were made in the context of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and not in the constitutional context. As Justice Stewart said, "it is important to note at the outset that the question is not one of constitutional law, but of statutory construction." 424 U.S. at ....., 47 L.Ed.2d at 638.

in community processes difficult, 412 U.S. at 768, 37 L.Ed. 2d at 325-26; and rules requiring a majority vote as a prerequisite to nomination, 412 U.S. at 766, 37 L.Ed.2d at 324.[10] While these standards were developed for use in situations involving multimember districts, they have equal application to redistricting schemes making use of single-member districts, such as the plan presently before this court. *Robinson* v. *Commissioners Court*, 505 F.2d 674, at 678 (CA5, 1974); *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455, at 458 n.2 (CA5), *cert. denied*, 407 U.S. 925 (1972). By proof of an aggregation of at least some of these factors, or similar ones, a plaintiff can demonstrate that the members of the particular group in question are being denied access.

The court must then look to the matter of whether the redistricting plan, whether adopted by legislative processes or proposed to be adopted and ordered by the court, will continue in effect an existent denial of access to the minority. Both the Supreme Court and this circuit have firmly held that where a reapportionment plan is formulated in the context of an existent intentional denial of access by minority group members to the political process, and would perpetuate that denial, the plan is constitutionally unacceptable because it is a denial of rights guaranteed under the Fourteenth and Fifteenth Amendments.[11]

10. Some courts have equated minority access to the political process with access of the individual to the ballot box or voting booth. We find this interpretation unpersuasive. The Court in *White* v. *Regester* would not have bothered to set forth a panoply of factors to gauge access to the political process if access meant only whether every individual could vote. Moreover the factors themselves are more relevant to whether a group has input into the political decision-making process than to whether a particular individual is free to vote.

11. White v. Regester, *supra*, 412 U.S. at 766, 37 L.Ed.2d at 324 (1973): Whitcomb v. Chavis, *supra*, 403 U.S. at 149, 29 L.Ed.2d at 379 (1971); Zimmer v. McKeithen, *supra*, 485 F.2d at 1305.

II. Denial of access to the political process in Hinds County

As proof of denial of access to the Hinds County political process, the plaintiffs presented substantial unrefuted evidence showing a past record of racial discrimination engaged in by the county and of official unresponsiveness to the needs of the county's black citizens. A summary of this evidence is in the district court's opinion, 402 F.Supp. at 670-71, and is reproduced as an Appendix to this opinion. We will not restate it but briefly note that it included the existence of these factors: no black's ever having been elected to Hinds County office; poll taxes and literacy tests as impediments to voting; segregation principles adopted by political parties; property ownership requirements to run for offices; disproportionate education, employment, income level and living conditions between whites and blacks in Hinds County; alleged bloc voting; requirement of a majority for election; prohibition against single-shot voting; systematic exclusion of blacks from juries; levy and maintenance of taxes for a dual school system. In short plaintiffs proved the presence in Hinds County of almost every significant factor indicative of denial of access to the political process. Under this evidence it was not possible to reach any conclusion other than that there had existed in Hinds County racial discrimination and official unresponsiveness to the needs of black citizens. This litany of past history—much of it relating to official action—also commands a conclusion that in significant aspects it was purposeful and intentional. The pattern is clear and stark, and is unexplainable on any grounds other than race.[12] It would be disingenuous

12. See discussion *infra* of indicia of motive and intent set out in Village of Arlington Heights v. Metropolitan Housing Development Corp., ... U.S. ....., 50 L.Ed.2d 450 (1977).

to even suggest that this past history sprang from benign or neutral motives.

While recognizing this record of the past the district court took the approach that the record was not proved to be an accurate reflection of current conditions.

> There is a point in time when past instances or examples of racial discrimination become remote—a time when a past history becomes a remote history. That time has arrived for Hinds County. The mistakes of the early 1960's and prior to that time do not, in this Court's opinion, have any significant effect on the nomination and election of Hinds County officials in 1975.
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> * * *
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> This Court finds that although there have been past instances of discrimination against blacks in Hinds County, and throughout this State, blacks are not excluded in 1975 from effective participation in the electoral system, there being no convincing evidence in this case that black citizens are denied access to the political process or hindered in any way from engaging in significant political activity, or otherwise discouraged from seeking political offices in Hinds County. Furthermore, plaintiffs have failed to prove any lack of responsiveness on the part of white elected officials, the contrary being true.

402 F.Supp. at 673. For several reasons this approach, and the conclusions drawn through the use of it, cannot stand. First, the court's approach required plaintiffs to come forward with evidence that the record of the past continues to be representative of the present. In other circumstances the mere passage of time might be of sufficient duration to permit an inference that what was

true in the past is no longer true. In such a case the plaintiff might be required to prove that conditions remain unchanged. Here the past official actions have been sweeping and pervasive. And the focus is on a period from the mid and late 1960's to the early 1970's. This is not such a span that, with any hope of accuracy, one can infer from the mere passing of time that, as the district court put it, "a past history becomes a remote history." Once plaintiffs established a past record of racial discrimination and official unresponsiveness which required the conclusion that at least until a short number of years past they had been denied equal access to the political processes of the county, it then fell to the defendants to come forward with evidence that enough of the incidents of the past had been removed, and the effects of past denial of access dissipated, that there was presently equality of access.[13] The defendants did not come forward with substantial evidence.

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13. The Supreme Court and the lower federal courts have followed this approach in other areas of desegregation. Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 26, 28 L.Ed.2d 554, 572 (1971) (district with a history of school segregation, burden on school authorities to justify a plan which contemplated the existence of some or all schools predominantly of one race); Keyes v. School District No. 1, 413 U.S. 189, 209, 37 L.Ed.2d 548, 564 (1973) (school system with a history of intentional segregation in any portion of the system has burden of proving that any existing segregated schooling is not also the result of intentionally segregative acts); Chambers v. Hendersonville City Bd. of Education, 364 F.2d 189, 192 (CA4, 1966) (school system which historically practiced racial discrimination, burden on school board to justify discharge of a disproportionately large number of minority teachers); Barnes v. Jones County School District, 544 F.2d 804 (CA5, 1977) (school system with immediately past history of racial discrimination, burden on it to justify demotion and discharge of black teacher).

Cf. Whitfield v. Oliver, 399 F.Supp. 348 (M.D.Ala., 1975) (three-judge court) which held that the defendant state officials violated the equal protection clause of the Constitution by setting the aid levels in the predominantly black Aid for Dependent Children program at 35% of "need" as opposed to 100% of

(Continued on following page)

Second, the court imposed an improper burden of proof of causal relationships. The Supreme Court and this court have recognized that disproportionate educational, employment, income level and living conditions tend to operate to deny access to political life. In this case the court held that these economic and educational factors were not proved to have "significant effect" on political access in Hinds County. It is not necessary in any case that a minority prove such a causal link. Inequality of access is an inference which flows from the existence of economic and educational inequalities.

Third, the district court considered specific indicia which it felt demonstrated that the "lack of access" of the past had become "equal access" in the present. These indicia will not bear the weight which the court put on them. The court referred to post-1966 registration of black voters and concluded that any black not currently registered has failed to register because of lack of interest

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Footnote continued—

"need" funding for the predominantly white Old Age Assistance Program. The court noted:

> "The history of the efforts of Negroes in Alabama to become full and free participants in the political processes of the state is recorded at length in the decisions of the federal courts.
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> • • •
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> "This extensive and extended history of exclusion of blacks from the Alabama political and governmental system causes the explanation of the defendants—that the disparity in the treatment of welfare programs is a result of "just politics"—to be of no legal effect as an explanation. To the contrary, such an explanation, when read against the march of history, reaffirms our conclusion that there was a discriminatory purpose and effect in the treatment of AFDC. Many of the obstacles that Alabama once placed in the way of full-fledged participation by its black citizens in the political life and government of the state have been removed. We would be naive to decide this case under a pretense that those obstacles never existed." 399 F.Supp. 355, 357.

or apathy. This conclusion is not supported by sufficient evidence. It is not a matter for judicial notice.[14] Similarly, on the issue of present unresponsiveness by white elected officials, the court noted that it had tried a case in 1968 concerning discriminatory jury selection methods[15] and that since that time it had found no actions or non-action by elected officials indicating discrimination or lack of responsiveness but rather a willingness to seek equitable solutions to racial problems. This observation by the court is not supported by evidence in the record. Also, and this is highly significant, the specific matters to which the court referred as indicia of the demise of non-access are matters in which elected officials acted to stop discrimination as a result of court orders or of federal legislation, such as desegregation, jury discrimination and reapportionment. To the extent that this evidence tends to prove anything, it is that litigation was required to remove discrimination in these important areas, and that litigation has worked. It does not tend to show that discrimination which is not the subject of litigation has been voluntarily removed.

Finally, this court has recognized the lasting impact of historical policies of racial discrimination and official unresponsiveness.[16] We addressed this point in *Zimmer*, when, in response to the very argument advanced by the district court in the instant case, we said:

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14. Failure to register may be, for example, a residual effect of past non-access, or of disproportionate education, employment, income level or living conditions. Or it may be in whole or in part attributable to bloc voting by the white majority, i.e., a black may think it futile to register.

15. In which plaintiffs made out a prima facie case of discrimination that defendants were unable to refute.

16. *See also, e.g.*, Robinson v. Commissioners Court, *supra*, 505 F.2d at 679; Moore v. Leflore County Bd. of Election Commissioners, *supra*, 502 F.2d at 624.

> Concededly, these impediments to participation in the electoral process have since been removed. The district court concluded that their removal vitiated the significance of the showing of past discrimination. This conclusion is untenable, however, precisely because the debilitating effects of these impediments do persist.

485 F.2d at 1306. Whether the residual effects of past patterns—as opposed to the practices themselves—have been dissipated is a matter for proof, not conjecture. There is no substantial evidence that the residual effects of the past no longer exist in Hinds County. To the contrary, the absence of black elected officials in a county where approximately 35% of the voting population is black is an indication that access of blacks to the political processes of the county is not yet unimpeded.

In summation, the plaintiffs established a long-existent history of sweeping and pervasive denial of access to the democratic political process and of official unresponsiveness to the needs of blacks. The trial court mistakenly placed upon plaintiffs the burden of coming forward with evidence that the long-existent and recent history was still current history at the time of trial. It erroneously placed on plaintiffs the obligation of proving a causal relationship between educational and economic deficiencies and the denial of access to political life. And, to the extent that there is evidence in the record tending to show that the structure and the residual effects of past denial of access have been swept away, it is not substantial enough to support a conclusion that the black minority now has equal access to political life. With the evidence viewed under correct standards, one must infer that the past conditions have not sufficiently changed to eliminate the historical denial of access.

Having dealt with past denial of access and its continuation to the present, we turn to the matter of official purpose or intent. Evidentiary indicia of racially discriminatory purpose or intent may, of course, arise in connection with the preparation of a redistricting plan. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L.Ed.2d 110 (1960). The district court found that there was no improper motive by the draftsman, and that finding is not plainly erroneous. The court also found that the supervisors' motives were neutral with respect to the drawing of the plan, i.e., the plan was devised in order to achieve population equality and approximate equalization of road and bridge mileage. In the narrow context of the drawing of the plan, this was not plainly erroneous,[17] but it was too narrow. The court did not address whether the plan perpetuated existent purposeful and intentional discriminatory denial of access, because it had erroneously concluded that the past denial of access had attenuated and no present denial existed. Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial. The redistricting body would only need to adopt a racially benign plan that permitted the record of the past to continue unabated. Such a rule would *sub silentio* overrule *White* v. *Regester*. It would emasculate the efforts of racial minorities to break out of patterns of political discrimination.

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17. Although, as discussed below in this opinion, motives were given undue weight at the expense of more fundamental concerns.

Recent Supreme Court cases have underscored the interplay, in equal protection cases, between racially discriminatory intent and racially differential impact as criteria for violation of the equal protection clause. In *Washington* v. *Davis*, ... U.S. ....., 48 L.Ed.2d 597 (1976), there was no claim of intentional or purposeful discrimination but only a claim that an employment test had a racially discriminatory impact. *Id.* at 604. The Court of Appeals for the District of Columbia held that lack of discriminatory intent was irrelevant and that disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was sufficient to establish a constitutional violation. *Id.* at 606. This the Supreme Court rejected:

> But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.

Id. at 607. The court went on to point out that "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 609. Invidiously discriminatory purpose may be "inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily upon one race than another." *Id.* at 608-09.

In the next term, in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, ... U.S. ....., 50 L.Ed.2d 450 (1977), the Court followed the *Washington* v. *Davis* holding that disproportionate impact is neither the sole touchstone nor irrelevant. The Court pointed out that an equal protection plaintiff is not required to prove that challenged action rests solely on racially

discriminatory purpose but that such purpose need be only a "motivating factor in the [legislative or administrative body's] decision." ____ U.S. at ____, 50 L.Ed.2d at 465. The Court set down a non-exhaustive list of factors useful in the "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." ____ U.S. at ____, 50 L.Ed.2d at 465. (1) The impact of the official action as bearing more heavily on one race than another, may be "an important starting point." (2) A clear pattern, unexplainable on grounds other than race, may emerge from the effect of state action even though the legislation is facially neutral. (3) "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." (4) Departures from normal procedural sequence. (5) Substantive factors, particularly if regularly considered important by the decisionmaker. (6) Legislative or administrative history. ____ U.S. at ____, 50 L.Ed.2d at 465-66.

Assuming that these cases are to be applied to racial minorities' claims of exclusion from the democratic process, they would be of particular significance in the present case if the only issue were whether the racially neutral plan *created* such exclusion in Hinds County. But there is a second issue which we have pointed out, whether the plan, though neutral in design, was the instrumentality for carrying forward patterns of purposeful and intentional discrimination that already existed in violation of our Constitution.

When the indicia of *Arlington Heights* for determining intent are applied to the patterns of denial of access to blacks in Hinds County, the conclusion is not open to doubt. The chronology earlier in this opinion and in Appendix A is part of the legislative and administrative history of official resistance to black efforts to move into the full stream of the democratic process in Hinds County. And, as in *Gomillion* v. *Lightfoot*, it is a stark pattern, unexplainable on grounds other than race. Indeed, not even the defendants contend otherwise. They simply say that things have changed.

Washington v. *Davis* and *Arlington Heights* sharpen the emphasis upon purpose and intent, and focus upon the effect of official action as an evidentiary factor rather than a single determinator. But nothing in these cases suggests that, where purposeful and intentional discrimination already exists, it can be constitutionally perpetuated into the future by neutral official action.[18] Nor do they suggest that *White* v. *Regester* and its progeny are no longer law.[19]

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18. If for no other reason, impact as an evidentiary factor, added to the present and past history, would preclude any such per se rule.

An analogy can be drawn between voting apportionment cases such as *White* v. *Regester* and school desegregation cases such as Green v. County School Board, 391 U.S. 430, 20 L.Ed.2d 716 (1968). In *Green*, the Court held that a school district which deliberately maintained a racially divided school system was under an affirmative duty to disestablish the dual school system, and that means such as freedom of choice plans, while not per se unconstitutional were unacceptable because they acted to strengthen rather than dismantle the dual system. In *White* v. *Regester* the Court in essence held that when a jurisdiction which has purposefully or intentionally created a denial of minority access to the political process adopts a plan of apportionment, it is under a duty to make sure that any apportionment plan it proposes ameliorates the denial of access.

19. The Supreme Court's latest decision on the racial impact of reapportionment, United Jewish Organizations of Williamsburgh, Inc. v. Carey, ____ U.S. ____, ____ L.Ed.2d ____, 45 U.S.L.W. 4221, 4227, 4231 (1977) lends strong support to the view that *White* v. *Regester* is alive and well. In *United Jewish Organizations* the opinions of Justices White and Stewart, representing the views of five members of the Court, both cite *White* v. *Regester* with approval. *Id.*

The approach which the Supreme Court condemned in *Washington* v. *Davis* and *Arlington Heights* was not the one it had itself embraced in *White* v. *Regester* but the approach it had previously rejected in *Whitcomb* v. *Chavis,* 403 U.S. 124, 29 L.Ed.2d 363 (1971). In *Whitcomb* v. *Chavis* the plaintiffs failed to prove either that the plan being challenged was an intentional racial gerrymander or that there existed an intentional denial of minority access to the political process which the plan did not remedy. In terms of *Washington* v. *Davis* and *Arlington Heights,* the plaintiffs in *Whitcomb* grounded their case solely on the "effect" of the plan, i.e., that it did not give Marion County blacks proportional representation in the legislature, and were therefore unsuccessful in challenging its constitutionality. In contrast, the Dallas and Bexar County plaintiffs in *White* v. *Regester* were successful, even though they did not prove that the plan in question was a *Gomillion* v. *Lightfoot* type of racial gerrymander, because they established the requisite intent or purpose in the form of the existent denial of access to the political process.

III. Perpetuation of denial of access through the reapportionment plan.

We turn to the inquiry whether the supervisors' reapportionment plan, adopted as a court-ordered plan, will in fact have the effect of perpetuating the denial of access to the political process that was proved by plaintiffs to exist. The district court concluded it would not, saying:

> The plaintiffs have failed to prove by the convincing evidence that their voting strength will be minimized or canceled out in any way by the Board plan, in which blacks constitute a majority of the population in two districts. In view of the possible

> variances in the computations of the voting age population in District Two and District Five, coupled with the heretofore noted inconsistencies in predicting block voting patterns in Hinds County, the Board plan offers black residents of this county, who constitute less than 40% of the total population, a realistic opportunity to elect officials of their choice, whether white or black, in two supervisors' districts and to significantly affect the election of county officials in the three remaining districts.

402 F.Supp. at 673. These conclusions of the court were not correct. The supervisors' plan fragments a geographically concentrated minority voting community in a context of bloc voting.[20] On its face, such a plan has a predictable tendency. Like a multimember plan, it tends to dilute the voting strength of the minority. In *Robinson* v. *Commissioners Court, supra,* a panel of this court noted that

> The most crucial and precise instrument of the . . . denial of the black minority's equal access to political participation, however, remains the gerrymander of precinct lines so as to fragment what could otherwise be a cohesive minority voting community. . . . This dismemberment of the black voting community . . . had the predictable effect of debilitating the organization and decreasing the participation of black voters.[21]

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20. Plaintiffs presented uncontradicted evidence that a pattern of strongly polarized racial bloc voting exists in Hinds County. Although the district court found what it felt to be inconsistencies in the racial bloc voting thesis, it nonetheless termed the plaintiffs' evidence on racial bloc voting "persuasive." 402 F.Supp. at 672 n.4.

21. *Accord*: Klahr v. Williams, 339 F.Supp. 922, 927 (D. Ariz., 1972) (three-judge court). Commentators have also made note of the dilutive tendencies of plans which fragment minority voting communities. *See, e.g.,* Clinton, Further Explorations in the Political Thicket, 59 Iowa L. Rev. 1, 4 (1973).

505 F.2d at 679. The facially predictable effect of carving up a concentrated black voting area in Hinds County was confirmed by the trial testimony. Plaintiffs' expert witnesses, Drs. Loewen and Henderson, testified that black *voting age population* in Districts 2 and 5 was less than 50%.[22] In testimony not refuted by other witnesses, Drs. Loewen and Henderson concluded that it would be unlikely if not impossible for blacks to ever elect a candidate of their choice under the supervisors' plan.[23] Thus, plaintiffs

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22. Dr. Loewen, 48% in District 2 and 48.6% in District 5, with a margin of error of one to two percentage points; Dr. Henderson, 47% in both districts, which he described as "tolerably reliable."

Plaintiffs made an offer of proof by Dr. Loewen that the percentage of *black registered voters* in Districts 2 and 5 were, respectively, 41.7% and 41.2%. His calculations were based on a study by the Institute of Politics at Millsaps College, located in Jackson. Defendants objected because the study was not available to be introduced, and the court sustained the objection. In its opinion, however, the district court stated that even if it assumed the correctness of Dr. Loewen's calculations based on the Millsaps study, the sole reason for lack of black voter registration was apathy. We have already pointed out that this conclusion is not supported by evidence.

23. However, we add the caveat that the election of black candidates does not automatically mean that black voting strength is not minimized or canceled out. We said in *Zimmer*:

> "[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record."

485 F.2d at 1307. We continue to hold to the position taken by the court in that case.

established that the redistricting under the supervisors' plan would carry forward into the future an exclusion of the black minority from the democratic process of the county by minimizing or cancelling their voting strength.

The district court found that rather than minimizing or cancelling the voting power of the blacks, the supervisors' plan offered them a "realistic opportunity" to elect officials of their choice in Districts 2 and 5. This will not stand examination. First, the district court gave specific weight to the existence of black *population majorities* in these districts, 53.4% in District 2 and 54% in District 5. "We have consistently recognized that 'access to the political process and not population [is] the barometer of dilution of voting strength.' " *Bradas* v. *Rapides Parish Police Jury*, 508 F.2d 1109, 1112 (CA5, 1975). Where the cohesive black voting strength is fragmented among districts, the presence of districts with bare black *population majorities* not only does not necessarily preclude dilution but, as a panel of this court pointed out, bare population majorities may actually enhance the possibility of continued minority political impotence. *Moore* v. *Leflore County Board of Education*, 502 F.2d 621 at 624 (CA5, 1974).

Also, the court took plaintiffs' unrefuted voting age population figures and concluded that if the figures were adjusted upward by several percentage points, the percentages of blacks in Districts 2 and 5 would be approximately 50%. With equal logic, the figures might have been adjusted downward to approximately 45%. These figures, adjusted upward to a skin-of-the-teeth "maybe so" 50% of voting age population, were coupled with inconsistencies in predicting bloc voting patterns to support the inference of "realistic opportunity." This is too attenuated. Our concern is with basic rights of American citizens. The responsibility of the defendants to permit minority voters a

proper role in democratic political life must be discharged by stronger stuff than gossamer possibilities of all variables falling into place and leaning in the same direction.[24]

Use of such thin evidence to conclude that blacks have a realistic opportunity to elect representatives of their choice is particularly inappropriate in the case of a court-ordered plan. In the case at bar public officials acting under an order of the court offered to the court a reapportionment scheme as a cure for existing one-man, one-vote deficiencies, asking that it be given judicial imprimatur. The Supreme Court's decisions in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 47 L.Ed.2d 296 (1976), and *Chapman* v. *Meier*, 420 U.S. 1, 42 L.Ed.2d 766 (1975), indicate that court-ordered apportionment plans are to be held to higher standards than legislatively enacted plans subject to the preclearance requirements of § 5 of the Voting Rights Act. 42 U.S.C. § 1973c. In *East Carroll* the Court held that the inclusion of multimember districts in a reapportionment plan was an "abuse of discretion," 424 U.S. at ....., 47 L.Ed.2d at 299, even though the Court has declined to hold that use of such a device was a *per se* constitutional violation. *White* v. *Regester*, 412 U.S. at 765, 37 L.Ed.2d at 324; *Whitcomb* v. *Chavis*, 403 U.S. 124, 144,

24. The panel opinion did not expressly reject the upward adjustment to "approximately 50%" but rather came up with its own conclusion of "about 47%," 528 F.2d at 539 n.11. Whatever the merits of the shifts in percentages around the 50% level, it must be kept in mind that the plan was court ordered and that (a) court-ordered plans are to be held to higher standards than legislatively enacted plans and (b) statistical deviations and variances which might pass muster in a legislative plan are unacceptable when found in a court-ordered plan. For example, in Chapman v. Meier, 420 U.S. 1, 42 L.Ed.2d 766 (1975), the Supreme Court held that variances in population which would be tolerable in legislatively formulated plans were impermissible in the context of a court-ordered plan because "[a] court-ordered plan, however, must be held to higher standards than a State's own plans." 420 U.S. at 26, 42 L.Ed.2d at 784.

29 L.Ed.2d 363, 376 (1971). In *Chapman* the Court held that variances in population which would be tolerable in legislatively formulated plans were impermissible in the context of a court-ordered plan because "[a] court-ordered plan must, however, be held to higher standards than a State's own plans." 420 U.S. at 26, 42 L.Ed.2d at 784.

Also, in approving the supervisors' plan the district court overemphasized factors that must be subordinated to the constitutional interests at stake. The court assigned great importance to the equalization of land area and road and bridge mileage. 402 F.Supp. 664-66. Supervisors have no responsibility for roads and bridges in the City, only in the rural areas. The 1969 plan had equalized road and bridge mileage and responsibility between the supervisors, and they were satisfied with this arrangement. *Id.* at 666. The draftsman of the 1973 plan were so informed and sought to preserve this feature of the 1969 plan as far as possible. This aim was one of the reasons for leaving the 1969 district lines intact in the rural areas and redistricting by altering lines within the City, where the black population is concentrated. The court held that the purpose of the draftsman was to achieve equalization of population with approximate equalization of road and bridge mileage, 402 F.Supp. at 667,[25] and that to achieve this purpose it was necessary to divide the people of the City, black and white, among the five districts. *Id.* at 666. Thus, to preserve the 1969 plan's equalization of rural road and bridge mileage as desired by the supervisors, the 1973 plan split up concentrated black urban areas. There was simply too much emphasis on the administrative convenience of equal road and bridge responsibility at the expense

25. In fact this finding was the basis for the finding that there was no discriminatory purpose in the preparation of the 1973 plan.

of effective black minority participation in democrary.[26] Factors such as these may be considered in redistricting but they are not talismanic. "It is clear, however, that the mere fact that an apportionment plan may satisfy some legitimate governmental goals does not automatically immunize it from constitutional attack on the ground that it has offended more fundamental criteria." *Robinson* v. *Commissioners Court*, 505 F.2d 674 at 680 (CA5, 1974). Less fundamental concerns must be subordinated to the constitutional interests of the citizenry. *Avery* v. *Midland County, supra*, 309 U.S. at 484, 20 L.Ed.2d at 53; *Turner* v. *McKeithen*, 490 F.2d 191, 196 n.23 (CA5, 1973); cf. *Taylor* v. *Monroe County Board of Supervisors*, 394 F.2d 333 (CA5, 1968).

Finally, the district court expressed doubts that an ameliorative plan could be constitutionally formulated because such a plan would be a racial gerrymander in the manner of *Gomillion* v. *Lightfoot*, 402 F.Supp. at 677. Whatever merit the district court's view may have had, it is no longer viable after the Supreme Court's recent decision in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, ... U.S. ....., ... L.Ed.2d ....., 45 U.S.L.W. 4221, 4227, 4231 (1977).

Plaintiffs proved a long history of denial of access to the democratic process. That history of official action is one of purposeful and intentional discrimination. The structure and the residual effects of the past have not been removed and replaced by current access. The supervisors' reapportionment plan, though racially neutral, will perpetuate the denial of access. By fragmenting a geographically concentrated but substantial black minority in a

26. In this court, the panel opinion also gave weight to roads, bridges and land areas as "nonracial and rational criteria." 528 F.2d at 538 & n.8 & 543.

community where bloc voting has been a way of political life the plan will cancel or minimize the voting strength of the black minority and will tend to submerge the interests of the black community. The plan denies rights protected under the Fourteenth and Fifteenth Amendments.

IV. Error on nonconstitutional grounds

As we have pointed out just above, a court-ordered reapportionment plan is held to higher standards than a legislative plan. A legislative plan need only meet constitutional standards. But, apart from constitutional grounds, a district court fashioning a reapportionment plan to supplant invalid apportionment may abuse its discretion in the shaping of remedial relief. *East Carroll Parish School Board* v. *Marshall, supra; Chapman* v. *Meier, supra.* In this instance, for the same reasons which we have spelled out in discussing the constitutional violations, the district court's approval of the supervisors' plan was just such an abuse of its equitable remedial discretion. In *East Carroll* the Supreme Court discussed this duty placed upon the court itself in the context of the preference in reapportionment cases for single member rather than multimember election districts, and held that a court fashioning a plan including multimember districts was guilty of abuse of discretion even though the use of such districts was not held to be a constitutional violation. 424 U.S. at ....., 47 L.Ed.2d at 299. Multimember districts are objectionable because they tend to minimize or cancel the voting power of minorities. Slicing up a cohesive minority voting area in a community where there is bloc voting has the same tendency to exacerbate rather than remedy denial of access to the political process. Thus, as a matter of its remedy-fashioning power, the court could not ap-

prove a plan which tended to carry forward into the future the long-lived denial of black access to the political process. Also, in the process of concluding that it would give approval the court unduly emphasized the administrative factors of roads and bridges, and it gave weight to black population majorities as a barometer of access to the political process. Additionally, the court mistakenly thought that its remedial power was constricted by the racial gerrymander concept of *Gomillion* v. *Lightfoot*.

Achieving one-man, one-vote political democracy without excluding minorities from political life is a complex task that challenges the best of intellects and requires examining many facets of the community, past, present and future. The problem is not susceptible of simplistic solutions, however seductive they may appear. No mechanistic solution is an alchemistic philosopher's stone that will turn all the problems of past and present to future gold.

REVERSED and REMANDED to the district court for the fashioning of a remedy.

Appendix A

(From 402 F.Supp. at 670-71.)

(26) This Court has carefully considered the evidence presented by the plaintiffs in their attempt to establish the proposition that the process leading to nomination and election are not equally open to blacks in Hinds County, including, inter alia, the fact that no black has ever been elected to the Hinds County Board of Supervisors or any other office in Hinds County (Exhibit P-24, page 32; testimony of Henry Kirksey); the retention of the poll tax as a requisite to voting in this State until 1966; the retention until 1966 by this State of a literacy test as a requisite to

registration, Mississippi Constitution § 244, as amended in 1954, implemented in Mississippi Code Ann. § 3213 (1956 Recomp.); the conditioning of primary participation on adherence to party principles, and successive adoption of alleged segregation principles by party organizations; the requirement that a member of the Board of Supervisors be a resident freeholder of the district which he represents and the owner of real estate therein valued at $1500, coupled with the fact that a much larger percentage of blacks in Hinds County fall below the census poverty lines as opposed to white, Mississippi Code Ann. § 19-3-3 (1972); Exh. P-3, page H-1); the designation in 1965 of Hinds County for the use of federal examiners pursuant to § 6 of the Voting Rights Act of 1965, 42 U.S.C. § 1973d, and the subsequent registration pursuant thereto; the disqualification of certain black candidates by the Hinds County Election Commission and exclusion of their names from the general election because they had voted in the August 1967 Democratic primary in violation of the 1966 Amendment to Mississippi Code Ann. § 3260 (1956 Recomp. Pocket Part), which was thereafter held unenforceable because of the failure of its submission pursuant to Section 5 of the Voting Rights Act and was subsequently objected to by the Attorney General;[a] the testimony of Dr. Loewen, based on 1970 census data, concerning the disproportionate educational, employment and income level and living conditions between whites and blacks in Hinds County, and the effect on blacks' ability to register and vote and to run as candidates for office; the allegedly high rate of block voting by whites and blacks in Hinds County; and several electoral mechanisms presently operative in elections in Hinds County, including the requirement of a majority vote as a prerequisite to party nomination and winning a special election, Mississippi Code Ann. §§ 23-3-69; 23-5-203; 23-5-

197 (1972); the prohibition against single shot voting, Mississippi Code Ann. § 3110 (1956 Recomp.); and the requirement of at-large elections of county election commissioners, Mississippi Code Ann. § 23-5-3 (1972), all of which the plaintiffs contend exclude blacks from equal opportunity to participate and win elections in Hinds County.

(27) Furthermore, this Court has carefully considered the evidence presented by the plaintiffs in their attempt to establish a lack of responsiveness on the part of white elected officials in Hinds County, including, inter alia, the findings by this Court and others of systematic exclusion of blacks from jury lists in the First and Second Judicial Districts of Hinds County, *Love v. McGee*, 297 F.Supp. 1314 (S.D.Miss.1968); *Goode v. Cook*, 319 F.Supp. 246 (S.D.Miss.1969), and *Spencer v. State*, 240 So.2d 260 (Miss.1970); the support and maintenance of the Board of Supervisors by tax levy of two allegedly racially segregated agricultural high schools and juniors colleges within Hinds County, Hinds Junior College and Utica Junior College, and an alleged disproportionate funding of these colleges (Minute Book 55, page 277, Exh. P-45); the appointment of only white persons as members of the County Board of Public Welfare in Hinds County (Minute Book 56, page 608; Minute Book 74, page 214; Kirksey Testimony); the failure of the Board of Supervisors to provide funds for the Community Hospital for Negroes of Jackson (Minute Book 56, page 681); the authorization of an ad valorem tax exemption for Jackson Academy, Inc., an allegedly racially segregated private school maintained for the purpose of providing an alternative to the public school desegregation (Minute Book 60, pages 25-26 and passim); and the maintenance and levying of taxes in support of a dual school system in Hinds County prior to 1965 by the Board

of Supervisors, in conjunction with the Hinds County Board of Education and the Board of Trustees of the Jackson Municipal Separate School District, the Board of Education members being elected from each of the supervisors' districts and the Board of Trustees being appointed by the Jackson City Council [*Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965); 355 F.2d 865 (5th Cir. 1966); 419 F.2d 1211 (5th Cir. 1969), rev'd, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970); 425 F.2d 1211 (5th Cir. 1970); 426 F.2d 1364 (5th Cir. 1970); 430 F.2d 368 (5th Cir. 1970); 432 F.2d 927 (5th Cir. 1970), and *United States v. Hinds County School Board*, 402 F.2d 926 (5th Cir. 1968); 417 F.2d 852 (5th Cir. 1969), cert. denied, 396 U.S. 1032, 90 S.Ct. 612, 24 L.Ed.2d 531 (1969); 423 F.2d 1264 (5th Cir. 1969)].

[Footnote omitted.]

GEE, Circuit Judge, specially concurring:

Both at the time of the district court's action and decision in this case and at the time of our panel opinion, 528 F.2d 536 (5th Cir. 1976), the clear constitutional law of equal protection seemed to be that racial gerrymanders, Gomillion v. Lightfoot, 364 U.S. 339, 5 L.Ed.2d 110 (1960), and election districts drawn along racial lines, Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), were invalid. Faithful to that apparent mandate, the trial court ordered the preparation of a plan drawn without regard to race, found on essentially undisputed evidence that it was so drawn, and ordered it installed and implemented. It also seemed to be the law that even such a plan might be invalid unless it had *effect* to give each significant racial group in the electorate of the apportioned community a fair opportunity to elect representatives of

its choice.[1] This was not though to mean, however, that voting districts must be so arranged that proportional representation, either by race or by racially chosen representatives, was afforded.[2]

In light of these imperfectly harmonious imperatives, the panel examined the district court's actions and decision from two perspectives. First, we reviewed the evidence supporting the finding that the court's plan was drawn without regard to race. This was, as noted, essentially undisputed. The court's decision that the plan was so drawn therefore seemed beyond our power to disturb. Next, we attempted to discern a model against which to measure the plan's likely effect, concluding as follows:

> It remains to determine whether the supervisors' plan approved by the court below though not by design, *otherwise*—that is, unintentionally—operates to minimize minority voting power in an impermissible way. To determine whether that power is minimized, we must first ascertain its proper or natural magnitude, its expectable effect under normal conditions when neither weakened nor enhanced. And this is simply stated: in an infinite series of elections, any 35% of the electorate should elect 35% of the candi-

1. The panel opinion quotes, 528 F.2d at 540-41, the commination against plans which "designedly or *otherwise*" minimize black voting strength found in Burns v. Richardson, 384 U.S. 73, 88 (1966), itself drawn from Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

2. At 528 F.2d 541, the panel opinion quotes Judge Rives, writing for the court in Gilbert v. Sterrett, 509 F.2d 1389, 1391:

> An apportionment scheme is not constitutionally impermissible merely because its lines are not carefully drawn to ensure representation to sizable racial, ethnic, economic or religious groups.

See also Whitcomb v. Chavis, 403 U.S. 124, 156-60 (1971), and Turner v. McKeithen, 490 F.2d 191, 197 (1973).

dates whom it favors or, in other words, it should receive proportionate representation. As applied to any hypothetical five-man board, then, our 35% voting bloc should be represented by two out of five officials favored by it about three-fourths of the time and by only one of the other fourth. This model illustrates its normal voting strength.

Plaintiffs are correct when they insist that we consider whether the impact of the black vote in Hinds County is diminished by the proposed plan. Where they err is in their selected model against which diminishment is to be measured. Plaintiffs focus on preserving intact the black geographical cluster in northern and central Jackson and would have us determine diminishment by inquiring merely whether the proposed district lines divide it. But of course they do. Any likely division of the county would do so except one drawn on racial lines with the purpose of securing safe "black" or "white" seats on the board of supervisors. Plaintiffs' focus is too narrow, their approach too mechanical, at this stage of the inquiry. There being no intended gerrymander, the proper present focus of inquiry is not a map area[19] but the voting power of the entire black populace of Hinds County, and the model against which its claimed diminishment must be measured is, as indicated above, the number of seats on the board proportionate to that population's percentage of the whole.

So tested, the conclusion of the district court stands firm that

> the black voting strength in Hinds County is not minimized or cancelled out by the 1973 Board plan, but on the contrary, the Board plan offers

> black residents of Hinds County, who constitute less than 40% of the total population thereof, a a realistic opportunity to elect officials of their choice, whether they be white or black, in two supervisors' districts and significantly affect the election of county officials in the three remaining supervisors' districts . . . .

19. Of course, the unusual shapes of the proposed districts are important. But the shapes are chiefly relevant to the question of whether the plan is a racial gerrymander. Once we accept the district court's unchallenged findings that the plan was drawn without reference to race and that the districts reasonably follow natural boundaries, *see* p. 538 *supra*, the significance of the geographic shapes is almost exhausted. They may, for example, indicate nothing more than a *political* gerrymander, an inhabitant of the thicket at present out of season to courts. *See* Jiminez v. Hidalgo County Water Imp. Dist. No. 2, 68 F.R.D. 668, 672-75 (S.D. Tex. 1975).

528 F.2d at 542-43. Measuring the plan against this model, we concluded that the district court did not err in finding that the plan offered a realistic opportunity to each segment of the community, consonant with its normal or natural voting strength, to elect representatives favored by it. We therefore affirmed the trial court.

At the time of en banc hearing in September 1976, the array of Supreme Court decisions in the general area of equal protection was, but for the addition of *Washington v. Davis*,[3] unaltered. Nevertheless, the en banc court was able tentatively to discern that we and the trial court

3. ..... U.S. ....., 48 L.Ed.2d 597 (1976). *See* n.4, *infra*.

had erred in our crucial assumption: that racial gerrymandering to augment or diminish the voting strength of voting blocs within the community was unconstitutional. On March 1, 1977, with the delivery of the Supreme Court's opinion in United Jewish Organizations of Williamsburgh, Inc. v. Carey, ... U.S. ....., 51 L.Ed.2d 229 (1977), it became clear that the en banc court was correct in its perception of things to come and that our panel had been mistaken. Thus, the opinion of the en banc court, indirectly but unmistakably commanding the trial court to devise and install a more partisan gerrymander in favor of Hinds County black voters so as to guarantee their proportionate representation on the county board, seems to be both required and appropriate.

Until only yesterday, it had seemed possible to discern a firm and accelerating trend in Supreme Court authority to require proof that discriminatory intent was a motivating factor in a state or local action before invalidating it.[4] As each of the decisions cited in footnote 4 was handed down, I for one became increasingly convinced that the unassailable (and, in my view, unassailed) finding of the trial court herein that no regard was given to race in preparing the now-invalidated plan rendered the plan invulnerable to attack on equal protection grounds. This budding conviction was cut down by the *United*

4. Washington v. Davis, *supra* (absent discriminatory intent, qualification examination for police recruits not invalid solely because it disqualified black applicants disproportionately); Austin Independent School Dist. v. United States, ... U.S. ....., 50 L.Ed.2d 603 (1976) (school desegregation order remanded for reconsideration in light of *Washington v. Davis;* segregative intent posed as issue in special concurrences); Village of Arlington Heights v. Metropolitan Housing Development Corp., ... U.S. ....., 50 L.Ed.2d 450 (1977) (denial of zoning for low-income housing project not unconstitutional for racially disproportionate effect; proof of discriminatory intent or purpose as motivating factor requisite).

Jewish Organizations decision, which I can only read as approving, not racial gerrymanders only, but those of such generous dimensions as to dictate the outcomes of elections and insure proportionate representation. It is true that the holding's import is slightly blurred since what was there approved was "voluntary" legislative action under pressure of the Attorney General, acting pursuant to the Voting Rights Act; but, like the Chief Justice, I do not see how these considerations can sanitize what would otherwise be unconstitutional.[5]

I take respectful leave to say briefly why I think this a wrong turning. It is hard to avoid the conclusion that by *United Jewish Organizations* what the Court underwrites is a tribal, rather than a republican, form of government.[6] Transposed to this case where the federal court must devise a plan, the clear implication of *United Jewish Organizations* is that a life-tenured magistrate is to exercise a casting vote in the selection of local legislators.[7] For who does not know that by judicious tinkering with apportioning lines almost any electoral outcome desired can be produced? Indeed, this is precisely what we now appear to require the district court to do.[8] I

5. *United Jewish Organizations, supra* at 256-59, *passim* (Burger, C.J., dissenting).

6. *See* United States Constitution art. IV, § 4.

7. The only logical alternative is to me inconceivable: that what is a constitutional gerrymander when done by a legislature is not so when done by a court in the legislature's default. Since the court is to act in the legislature's place, surely it is to do what the legislature should have done.

8. I say "appear" because I am as confused as Judge Clark, *infra* at ___, about what election outcome it is that the en banc majority directs the district court to produce. What is generally desired—a plan confected on racial grounds and weighted more heavily toward the black voter—is tolerably clear. But if an outcome is to be configured, and if the majority is correct in

(Continued on following page)

had not thought that the constitution empowered any court to intrude so far upon the elective process. But unless this is what the United Jewish Organizations decision requires and means, then I do not know what it means.

And if this is its meaning, we have indeed come a long way from Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), with its demand that every citizen's vote be equal in weight as nearly as may be,[9] and from Gomillion v. Lightfoot, *supra*. These decisions had effect to free the electoral process from vote-weighting contrivances; *United Jewish Organizations* approves their deliberate imposition, and on avowedly racial grounds at that. It is true that the racial gerrymander there approved was done by the New York Legislature under pressure from the Congress,[10] but I am unable to grasp how this can validate action so plainly at variance with the language of the fourteenth and fifteenth amendments and uncomfortable with court action intruding so

Footnote continued—

its factfinding of pervasive bloc voting, several choices are possible. The district court could, for example, deploy the 35% minority of black voters so as to produce three districts out of the five with almost two-to-one black majorities and so insure, again assuming the rigorous voting by race which the majority ascertains, a black majority on the county board. I doubt this is what the majority envisions; probably what it wants is guaranteed proportionate representation by race. But I do not know; and if this is what the majority wants the district court to produce, then I think the majority should steel itself to say so.

9. "Every qualified resident . . . has the right to a ballot for election of state legislators of equal weight to the vote of every other resident. . . ." 390 U.S. at 478.

10. It seems ironic that there, in order to achieve a sufficiently partisan gerrymander in favor of "non-whites," the Attorney General required (the Supreme Court eventually approving) that the New York Legislature fragment one of the few geographically concentrated communities of Hasidic Jews in the United States; while the majority in this case invalidates the district court's plan primarily because it "fragments a geographically concentrated minority voting community."

purposively and affirmatively upon the process of selecting legislative bodies. Removing trammels upon the equality of the franchise is one thing; deliberately gerrymandering to weight some votes and lighten others in order to produce a representative of a particular race, or at least a representative especially beholden to one racial bloc of the electorate, seems to me quite another. What seems to be envisioned is something more approximating a tribal council than a representative body chosen by republican methods.

To say no more, then, with the delivery of *United Jewish Organizations*, my apprehension of equal protection law is cast in disarray. Doubtless the Court holds a coherent vision of better things to come which is denied me.[11] At any rate, I am sustained by the recollection that it is not for us to pursue matters of national policy in competition with or obstruction of the Court. Where relevant precedent exists, our duty is to ascertain and obey that which is closest and most recent. For the time being, that is *United Jewish Organizations*. Since it is, I concur in the en banc court's judgment invalidating those of our panel and the district court, though not in its opinion.

COLEMAN, Circuit Judge, dissenting:

I join in the dissenting opinion filed by Judge Clark. I agree with all that he has written, but I am particularly disappointed that the en banc Court reassigns the District Court to the drawing board without specifying the standards which would meet the requirements of the law. This will likely breed further appeals and further delays.

11. It may even be that *United Jewish Organizations* signals the first note of recall from the thicket. That opinion can be read as indicating that from henceforth the courts are to withdraw with the best grace they can muster and leave contests on this particular darkling plain to be fought out among Congress, the Attorney General and local governments. But in this event, what are such district courts as ours here to do when they themselves are required to fashion plans?

Secondly, I must point out that the Order granting rehearing en banc in this appeal was entered May 12, 1976, exactly one year ago as this is being written. The en banc opinion, in its present form, was circulated on March 31, 1977. In the meantime, on February 28, 1977, the Supreme Court heard oral argument in *Connor v. Finch*, the statewide Mississippi legislative reapportionment case. The *Kirksey* case is so interrelated with *Connor* that the *Kirksey* record was appended as an exhibit to that appeal and is the subject of discussion in the Supreme Court briefs. As one of the Judges who sat on *Connor*, it is my considered opinion that when the Supreme Court acts on *Connor* there will be nothing left to *Kirksey* but a brief *per curiam*, one way or the other.

It is well known, of course, that we have an entrenched practice of deferring action on an appeal involving issues pending before the Supreme Court. We await, as we should, guidance which we think is likely to be forthcoming from the High Court. The next scheduled election for Supervisors in Mississippi does not take place for over two years—August, 1979. After *Connor* was argued, with no opinion yet ready to come down from the en banc Court in *Kirksey*, I requested in writing that we defer our opinion until the Supreme Court decided *Connor*. Contrary to the precedent which has been followed in this Court during the twelve years I have been a member of it, the request was denied by a majority of the en banc Court.

Since Hinds County has thus, in my opinion, been denied the treatment usually accorded other litigants, I respectfully record the occurrence and make no further comment.

CLARK, Circuit Judge, with whom COLEMAN and HILL, Circuit Judges, join, dissenting:

From another part of the political thicket I answer Judge Gee's lamentation that his panel opinion views have been lost in new Supreme Court law with the equally plaintive response that I am lost in the analysis, the supporting facts, and the remand for remedy disposition which today's en banc majority imposes.

Two distinct approaches have been utilized in assessing the validity of apportionment plans. Where the plan under attack was adopted by a state or local legislative body, a constitutional analysis has been used. *See e.g.*, White v. Register, 412 U.S. 755, 93 S. Ct. 2342, 37 L. Ed. 2d 314 (1973). But where the challenged plan was put into effect by federal judicial decree, a "propriety of the remedy" analysis has been utilized. *See e.g.*, East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S. Ct. 1083, 47 L. Ed. 2d 296 (1976). Since this case involves a court-ordered plan, only the latter approach is applicable. The en banc majority's partial reliance on the constitutional analysis is, I respectfully submit, misplaced, because this plan was not implemented by state action. It is a distracting confusion because evidence that the Board of Supervisors intended to discriminate on the basis of race, which would be necessary to demonstrate the existence of a constitutional violation, is irrelevant to the determination of whether the remedy formulated by the district court was a permissible one.

Under the proper remedy analysis, our task is to decide what constitutes an abuse of discretion in formulating a remedial apportionment plan, and to examine the record in light of the standards developed. To date the Supreme Court has indicated that a district court abuses its discre-

tion when it creates a plan (1) in which there exists excessive interdistrict population disparity, or (2) that contains multimember districts "absent unusual circumstances." *See* Chapman v. Meier, 420 U.S. 1, 95 S. Ct. 751, 42 L. Ed.2d 766 (1975); East Carroll Parish School Board v. Marshall, *supra*. To these two forbidden practices the majority proposes to add a third: the creation of a plan that "slic[es] up a cohesive minority voting area in a community where there is bloc voting." The majority suggests that this addition is justified because such a plan is like one containing multimember districts in that it tends to submerge the political voice of racial or political minorities. But in *Chapman v. Meier, supra*, the Supreme Court supported its holding that the inclusion of multimember districts in a court-ordered plan was an abuse of discretion with four reasons. The tendency of multimember districts to submerge minorities was merely one. None of the other three reasons relied upon in *Chapman* is applicable here. In addition, this court furnishes the district court no guidance in determining whether the new remedy it must fashion will meet this third standard.

Although it does not flesh out the premises which support its third factor, the majority clearly indicates it would necessarily rest on two factual findings: First, that there is bloc voting within the affected community; and second, that blacks are a minority of the voting age population in the districts created. For the reasons discussed below, I respectfully submit that an insufficient basis exists in the present record for drawing either conclusion. Thus, even if the majority's third factor is a proper one, it should not be used in remedy formulation until the foundation facts are established.

The key fact premise of Judge Godbold's opinion is that in Hinds County whites always vote for whites and

blacks always vote for blacks. It is taken as a given, yet its only basis is a survey. While the district court did characterize the survey as "persuasive evidence," it found the survey to be internally "incomplete" and "inconsistent" and "completely inconsistent" with other proof in the record. Although no contrary opinion or survey evidence was offered, I believe the unequivocal determination of incredibility given this survey by the trier of facts at least requires a remand to determine which way truth lies as to this crucial issue.

The district lines which the district court drew are ordered obliterated because two districts show 48% rather than clear majority black voting age populations. These statistics are based on 1970 census data. Yet that same seven-year-old data base discloses that in the age groupings which would include those now eligible to vote, the percentage of blacks grows increasingly greater in each younger age cohort group.[1] I don't know whether the presently formed districts are now clearly majority black

1. The 1970 Census of Population (advance report), General Population Characteristics, U. S. Dept. of Commerce, Publication PC (VA)-26 (Miss.), shows the following data for Hinds County, which had a general population in 1970 that was just over 60% white:

Children aged 15-24 in 1970:

Total:	41,019	
White:	23,542	57.4%
Black:	17,477	42.6%

Children aged 5-14 in 1970:

Total:	46,980	
White:	24,661	52.5%
Black:	22,319	47.5%

I readily acknowledge that the groupings are over-inclusive at the young- and old-age ends. The data is not available in more refined form in the referenced publication. It does suffice to make the statistical point that the percentage of blacks in Hinds County's 1970 population increased significantly in the lower-age brackets.

or not. I only assert that the rest of the court doesn't know either. If they are today in fact "safely" majority black in voting age population, the majority would not say that they are wrongly drawn under the criteria it advances. An injunction always looks to the future. Conditions existing in 1970 are pertinent only as guides to the present, and those conditions indicate we should require present proof.

Equally distracting is the majority opinion's creation and ex post facto application of a new presumption in its constitutional analysis. The proof showed that Hinds County has a history of racial discrimination. Today it is announced for the first time in a redistricting case that the defendants must bear the burden of showing this past forms no part of the present. That is a burden they might have carried had they but known they were obliged to do so.[2] Despite its insertion at the appellate level, and contrary to the requirements imposed at trial, we do not permit this defendant to try to meet our newly imposed standard. This court has never cut across due process in this fashion before. I regret we do it today.

I am perplexed by the majority's determination that the district court abused its discretion in formulating a remedy which that court found to be wholly free of racial motivation. The trial court has been held to have abused its discretion by "slicing up a cohesive minority vote area in a community where there is bloc voting," and approving a "plan which tended to carry forward into the future

2. Without attempting to fix blame or praise on local, state or federal politics, it is an easily established fact that black registration and participation in electoral procedures is up dramatically in Hinds County, and economic and social advances by blacks which were totally unenvisioned by either race ten years ago, have also occurred. I say this to make plain that the burden may not be as impossible to meet as the recitation of past history may indicate.

the long-lived denial of black access to the political process." Aside from my disagreement with the appellate fact-finding that underlies these condemnations, I don't understand them to give proper guidance to the district court in its task of revising the geographic lines between supervisor districts in Hinds County. Is the "higher standard" that the court plan must meet more than the requirement that blacks be afforded a realistic opportunity to elect representatives of their choice? Is the district court told that the *United Jewish Organizations* case mandates racial gerrymandering? If it is, what is the district court's duty and what are the ambits of its discretion? Must that court assume bloc voting and create "safe" black seats on the Board of Supervisors? How many must it create, as many as possible or just enough to approximate the county-wide black population?

I respectfully submit that the en banc court has been too free with criticism and too parsimonious with guidance, and I therefore dissent from the remand of the case limited to remedy formulation before we know what the facts are and before we say what standards must be applied.

HILL, Circuit Judge, with whom CLARK, Circuit Judge, joins, dissenting:

I join in the dissent of Judge Clark, and I am constrained to add a few lamentations of my own.

In our federal judicial system, district court judges are unable to avoid deciding any particular case submitted to them. The litigants and their counsel, for the most part, determine the issues which are presented to the court and the trial judge must ultimately render a judgment delineating the proper and legal result. This final judgment establishes the rights and liabilities of the parties

and must be articulated with sufficient definiteness so that a marshall may execute it. I submit that when a case is appealed to this court, we are under the same duty to decide the issues presented with sufficient clarity that a conscientious district judge may execute our decision. The opinion for the majority avoids doing so.

The procedure tacitly adopted by the majority might be appropriately described as "dodge the bullet." The opinion for the majority is content with general observations on the development of the law in the area and expresses general discontent with the course of events in the district court. Then, the truly tough and nettlesome issues are swept from our bench and returned to the trial court in an apparent apocalyptic "reversed and remanded to the district court for the fashioning of a remedy."

I regret that this course has been chosen. In an expression of chauvinism perhaps not totally inappropriate due to my recent appointment to this court, it has been my observation over the years that of all the judicial bodies in this land the United States Court of Appeals for the Fifth Circuit has traditionally taken the lead in making hard decisions in this and related areas of the law. We shun our history in the decision of this case and merely say to our district court judges, "Guess again; we will tell you after the fact whether you are right."

I see it as our duty to inform rather than confound; to explain rather than merely complain; to enlighten rather than obfuscate. When the district judge and counsel for the litigants in this case have studied the opinion for the majority, they should know what is to be done in the case. Litigants and trial judges appeal for direction from this court, but I apprehend that they look in vain upon the majority opinion. The only direction given by

the disposition of this case is that the direction taken was wrong so try another way. I apprehend that responsible public officials throughout this circuit desire to conduct the affairs of their offices according to the law. While the majority opinion accurately proclaims the difficulties confronting public officials, lawyers, and district judges, the case is remanded over two years after we were asked for direction without the much needed guidance. We do the litigants, trial judges, public officials and ourselves a disservice.

What I write here discloses some different views from those expressed by Judge Godbold for the majority. Yet, my dissent is not so much from what he says as from the majority's failure even to apply the principles it expounds to the issues in this case for the guidance of the litigants and the trial court.

One reads *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, No. 75-104, ... U.S. ....., 45 U.S.L.W. 4221 (1977) and instinctively feels that the Attorney General also drew back from articulating his decision.[1] Thus, the parties were relegated to operating on the basis of a "leak" from an undisclosed member of his staff[2] to which they promptly responded.[3] This scenario suggests that if only the parties could find out what the Fifth

1. Thus, in his letter to the New York State authorities the Attorney General would only say, "[w]e know of no necessity for such configuration and believe other rational alternatives exist." *United Jewish Organizations* v. *Carey, supra* at ..... n. 6.

2. An unnamed Justice Department official made known that satisfaction of the Voting Rights Act would necessitate the creation of 10 districts with threshold nonwhite populations of 65 percent. *See United Jewish Organizations* v. *Carey, supra* at ..... (Brennan, J., concurring in part).

3. The revised plan submitted by the state contained ten districts with nonwhite populations of between 65 and 90 percent.

Circuit *really* wants *sub silentio*, then they would readily comply. This is no way for the Office of the Attorney General to transmit decisions and I am confident that this court would not tolerate such a procedure.

I frankly have no more appetite than my brothers for "biting these bullets." If it were not legally mandated that "[c]ases and controversies shall be heard and determined" by our court, 28 U.S.C.A. § 46, I might remain silent and concur. Since it is our duty to decide, I shall refer to only a few of the questions that I feel have been raised but which the majority declines to answer.

What is the legal significance of the fact that no black person has ever been elected to the Board of Supervisors of Hinds County, Mississippi? The Court repairs to *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), to restate that "[c]learly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." (footnote omitted). Later, the majority observes that "the absence of black elected officials in a county where approximately 35% of the voting population is black is an indication that access of blacks to the political processes of the county is not yet unimpeded." *Ante* at ..... While these two assertions may not be contradictory in their finer points, the question raised and left unanswered by the court is the significance of this fact. The majority uses this fact to support the proposition that the residual effects of past practices on the access of blacks to the political process have not been dissipated in Hinds County. Even if true, however, the probative value of this fact on the constitutionality of the present apportionment plan—under which no elections have been held—is tenuous.

More fundamental, this conclusion by the majority raises the question of what is meant by "access to the political process." Ironically, the task of establishing the substantive content of this concept falls upon federal judges who are appointed rather than elected and who have from the time of their appointment properly removed themselves from the art and science of politics. Is genuine access to the political process better provided to a minority by placing its members in one or two political "ghettos" so that supervisors from other districts have, remaining, no significant number of minority voters to whom they must pay heed in the discharge of their duties? Is it better access to be assured of the power to elect a minority or to be in a position to have a significant impact upon the outcome of elections for the majority? Is it our national purpose under the law to achieve a truly homogenous society in which free and independent voters cast their ballots for candidates that they deem best qualified, regardless of race, or do we despair of that goal and retreat to establishing black elections for black officials and white elections for white officials as the only possible response to the odorous "white primaries" of the temporally recent but factually remote past. The district court in this case is entitled to know which course this court directs.[4]

I suggest that the conscious creation of "safe" black districts may not be a talismanic solution for insuring access to the political process. Simplistic solutions tend to be stopgap remedies. Surely, no one believes that all that this court must do is insure that a few blacks

4. For my part I shudder to think that the majority endorses the words of John W. Davis for South Carolina in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). "The good is sometimes better than the best." *See Wright* v. *Rockefeller*, 376 U.S. 52, 62 (1964) (Douglas, J., dissenting).

are elected in Hinds County and nirvana shall be reached. To place the black citizens in that perpetual minority position could be permanent denial of the sort of political access that results in governmental responsiveness.

Conscious "benign" racial gerrymandering also raises possible problems. A purported preference may disguise a policy that actually perpetuates disadvantageous treatment. "An effort to achieve proportional representation, for example, might be aimed at aiding a group's participation in the political processes by guaranteeing safe political offices, or, on the other hand, might be a 'contrivance to segregate' the group, thereby frustrating its potentially successful efforts at coalition building across racial lines." *United Jewish Organizations* v. *Carey, supra* at ..... (Brennan, J., concurring in part) (citation omitted). In addition, "benign" racial preferences may stimulate latent race consciousness and stigmatize recipient groups. *Id.* Finally, "benign" racial preferences assume that all individual minority persons have identical interests—an assumption often divorced from reality. *See Wright* v. *Rockefeller, supra* at 53-54, 62 (Douglas, J., dissenting).

As mentioned above, it seems inappropriate that those of us in the one branch of government purposefully and properly removed from politics should presume to weigh and decide these questions of political access and official responsiveness on a record totally devoid of any expert evidence from either practical politicians, political science students, or both. Were the case to be remanded as Judge Clark suggests (and in which suggestion I join) for the taking of evidence as to the continued effort of past denials, the district court should also be directed to develop a record of qualified evidence on these issues.

Finally, does the majority say that, in a case such as the one before us, the district judge is required under

the law consciously to consider race in establishing voting districts? *United Jewish Organizations* v *Carey, supra,* clearly holds that in cases arising under the Voting Rights Act, 42 U.S.C.A. § 1973 *et seq.*, a state legislature *may* constitutionally do so. Must a district court in a non-Voting Rights Act case draw district lines with a conscious regard for race? Perhaps the Constitution requires it (though I doubt it), but I submit that our court is obligated to "belly up to the bar" and furnish our district court brother our answers to these hard questions rather than content ourselves with expressions of discontent with his solution.

I must confess that I am somewhat perplexed by the concurring opinion of Judge Gee. He apparently reads *United Jewish Organizations* v. *Carey, supra,* as "commanding the trial court to devise and install a more partisan gerrymander in favor of Hinds County black voters so as to guarantee their proportionate representation on the county board." *Ante* at ..... With all due respect I find this conclusion bewildering. My reading of the Supreme Court's opinion is much less daring. *United Jewish Organizations* merely holds that a state political body attempting to comply with the Congressional mandate embodied in the Voting Rights Act is not *prohibited* by the Constitution from considering race in establishing election lines. This is a far cry from ruling—as our court may be doing today—that the Constitution *requires* that race be consciously considered.

Related to this subject, one notes that Judge Godbold refers to the rule "that court-ordered apportionment plans are to be held to higher standards than legislatively enacted plans subject to the preclearance requirements of § 5 of the Voting Rights Act." *Ante* at ..... I take no issue with this rule, but I am puzzled by his application of it

in this case. Apparently, this rule is suggested as bolstering the court's rejection of the court-ordered plan in this case. Of course, the *United Jewish Organizations* decision was concerned with a legislatively enacted plan. For me it more logically follows that, because we are dealing with a court-ordered plan in this case, and since court-ordered plans are held to higher standards, the Constitution may very well prohibit conscious racial gerrymandering by a court while permitting it by an elected state political body implementing the Voting Rights Act. In sum, what the "lower standard" allows a state legislature to do, the "higher standard" prohibits a federal court from doing. I respectfully suggest that the majority has simply placed the rule on its head.

Were these and other issues addressed by our court today, I might find myself in no posture to dissent. As it is, I am in no posture glibly to concur. I also join with Judge Clark in the strong opinion that the county litigants should be afforded an opportunity to develop evidence for the district court as to whether past practices presently affect access to the political process now that the rules have been laid down. The passage of time alone does not create remoteness; events can make remote that which is temporally recent. Nothing is older than yesterday's newspaper and there is hardly anything newer than our Constitution and its Bill of Rights. The majority chides the district court for decisions based on conjecture. Then, this court establishes an evidentiary rule and defaults the defendants for failing to have predicted and followed it. I submit that the question of whether past practices affect present access is not one that should be based upon "conjecture" at the trial or on appeal.

As Judge Coleman in dissent points out, we feel compelled to hand down our decision without further delay.

I take no special issue with that except to note that in the time available I have been able to suggest only some of the issues upon which we offer no decision. Others will appear. The last paragraph of the majority opinion accurately articulates the difficulties to be encountered in their resolution. Yet, we should decide the hard ones along with the relatively easy ones. I apprehend that the district judge would appreciate our directions even more than the compliment implied in our remand to him of these questions.

Therefore, I dissent.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
For the Fifth Circuit
October Term, 1976

No. 75-2212

D. C. Docket No. CA-4939(N)

HENRY J. KIRKSEY, ET AL., Individually, and on behalf of all others similarly situated,
Plaintiffs-Appellants,

vs.

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

JUDGMENT ON REHEARING EN BANC

(Filed August 10, 1977)

This cause came on to be heard on plaintiffs-appellants petition for rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

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*Because of illness Judges Wisdom and Thornberry did not participate in the hearing or in the consideration of this case.

of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of the Court en banc;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 31, 1977

GEE, Circuit Judge, specially concurring.

COLEMAN, Circuit Judge, dissenting.

CLARK, Circuit Judge, with whom COLEMAN and HILL, Circuit Judges, join, dissenting.

HILL, Circuit Judge, with whom CLARK, Circuit Judge, joins, dissenting.

Issued as Mandate: Aug. 8 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-499

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL.,
Petitioners,

v.

HENRY J. KIRKSEY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. App. A) is reported at 402 F. Supp. 658. The panel opinion of the Court of Appeals for the Fifth Circuit (Pet. App. B) is reported at 528 F.2d 536. The opinion of the Court of Appeals for the Fifth Circuit sitting *en banc* (Pet. App. C) reversing the panel and the District Court is reported at 554 F.2d 139.

JURISDICTION

Petitioners allege the jurisdictional prerequisites they believe grant this Court jurisdiction in the *Jurisdiction* section of their Petition (p. 2). The opinion and judgment of the Fifth Circuit sitting *en banc* was rendered on May 31, 1977. Thus the deadline for filing the Petition pursuant to 28 U.S.C. §2101(c) was August 29, 1977. The Petition was not filed until September 30, 1977. Petitioners believe that their petition for rehearing *en banc* of the *en banc* judgment below operated to extend their time to petition for certiorari. Respondents contend, *infra*, that Rules 35 and 40, F.R. App. P., do not authorize the filing of petitions for rehearing or rehearing *en banc* from *en banc* decisions of Courts of Appeals, that petitioners may not unilaterally extend the time for filing their Petition for Certiorari by filing a petition for rehearing or rehearing *en banc* from an *en banc* decision of the Court of Appeals, and that therefore the Petition was untimely filed. This Court is therefore without jurisdiction.

QUESTION PRESENTED

Whether a District Court-ordered county redistricting plan, which creates five oddly shaped supervisors' districts that span the county in long corridors and reach into the City of Jackson to fragment and disperse the heaviest black population concentration in the county among all five districts, and which—in a county which is 39% black—deprives blacks of a voting majority in any of the five districts, constitutes an abuse of the District Court's equitable remedial discretion, or is unconstitutional, because it perpetuates the intentional and purposeful discriminatory denial to black voters of equal access to the political process?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable provisions of the Fourteenth and Fifteenth Amendments to the United States Constitution are set out in the Petition at pp. 4-5. The statutes involved are 42 U.S.C. §§ 1971(a)(1), 1973, and 1983.

42 U.S.C. § 1971(a)(1) provides as follows:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, provides as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

This case involves the District Court-ordered redistricting of the five supervisors' districts (beats) of Hinds County, Mississippi. These are the same supervisors' districts which this Court cited as an example of what District Courts should avoid in court-ordered legislative redistricting plans in the Mississippi legislative reapportionment case decided last Term, *Connor* v. *Finch*, Nos. 76-777, 76-933, 76-934, and 76-935, decided May 31, 1977 (slip op. at 15-17).

Respondents are six black registered voters of Hinds County who represent the class of black registered voters of Hinds County and who filed this action on July 27, 1971 seeking a constitutional and equitable county redistricting plan for Hinds County. The United States Department of Justice also entered an appearance in the Court of Appeals supporting plaintiffs' contentions and urging reversal of the District Court's decision.

Under Mississippi law, each county is divided into five supervisors' districts, or "beats," which serve as election districts for members of the county board of supervisors —the county governing board—justices of the peace, constables, and members of the county board of education. Although Hinds County is 39% black (1970 Census), all the elected county officials are white, and despite many attempts no black person has ever been elected a member of the county Board of Supervisors, Justice of Peace (now called Justice Court Judges), Constable, or member of the county Board of Education.

Prior to the first court-ordered county redistricting in 1969, two of the five supervisors' districts of Hinds County had black majorities of 76.26% (District 2) and 67.92% (District 3) (Pet. App. A, p. A16). After passage of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, permitting Hinds County blacks to register and

vote for the first time in large numbers,[1] and after the first black candidates attempted to qualify to run for county office, the Board of Supervisors devised a new county redistricting plan and the District Court for the Southern District of Mississippi (per Harold Cox, J.) approved the plan and ordered it into effect in a lawsuit filed by a white plaintiff.[2] That plan created five oddly shaped districts which extended from the far corners of the county in long corridors that fragmented the heavy black population concentration in the City of Jackson. Under the 1969 court-ordered redistricting plan, all five districts were majority white (Pet. App. A, p. A17), thus reducing the number of majority-black districts from two to zero. All black candidates who ran for county office under that plan in the 1971 county elections were defeated.

In 1971, prior to the county primary and general elections, respondents filed this action as a class action alleging that the 1969 county redistricting plan unconstitutionally minimized and cancelled out black voting strength, unconstitutionally failed to provide equality of population among the districts, and was unenforceable because of an objection to the plan lodged by the United States Attorney General pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.[3]

---

[1] Prior to passage of the Voting Rights Act, 92.1% of the voting age whites were registered to vote, but only 15.5% of the voting age blacks were registered. *Hearings on the Voting Rights Act of 1965 (S. 1564) Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2, at 1254 (1965).

[2] *Smith* v. *McGee*, Civil No. 4483 (S.D. Miss., Order of Dec. 19, 1969) (Ex. P-12).

[3] In his objection letter, the Attorney General found that

> "the district boundary lines are located within the City of Jackson in a manner that suggests a dilution of black voting strength will result from combining a number of black persons with a larger number of white persons in each of the five

After submission of stipulated statistics based on 1970 Census data showing a total deviation from population equality of 41.46% among the 1969 districts, the District Court in 1972 held the 1969 plan unconstitutional for malapportionment and ordered the Board of Supervisors to submit a new equally apportioned redistricting plan. Instead of drafting a new plan, the Board of Supervisors simply revised the boundaries of four of the five districts of the 1969 plan in five places in the City of Jackson and in 1973 submitted the revised 1969 plan to the District Court. The District Court in 1975 after trial adopted the Board's new plan and ordered it into effect (Pet. App. A, pp. A1-A38).

1970 Census statistics show that 69% of the total black population of Hinds County reside in 48 contiguous, majority black Census enumeration districts in the central portion of the City of Jackson (Pet. App. A, p. A6) in an area shaped like a boot.[4] Of the 63,267 persons living in these 48 enumeration districts, 92% are black. The court-ordered redistricting plan is an "apple pie" plan in which each of the five districts span the county in long,

districts. * * * Moreover, our discussions with [Board attorneys and the draftsman] have revealed that such district lines within the City of Jackson were not based on any compelling governmental need and appear to be located fortuitously without any compelling governmental justification for their location. Our analysis persuades me that the specific location of the lines is not related to numeric population configurations or considerations for district compactness or regularity of shape." (Complaint, Appendix VI.)

Defendants took the position that since the plan had been approved by the District Court in prior litigation, the objection had no legal effect. When the Justice Department filed suit to enforce the objection, plaintiffs voluntarily dismissed the § 5 count of their complaint. The Justice Department lawsuit subsequently was held moot when the plan was struck down for malapportionment in this case.

[4] A map showing the location of this heavy black population concentration (shaded area) and the boundaries of the five districts under the court-ordered redistricting plan is attached to this Brief.

narrow corridors going east and west, slice into this heavy black population concentration in the City of Jackson, and fragment and disperse the black population among all five districts. The District Court agreed with plaintiffs that District 3 resembles a turkey and District 4 looks like a baby elephant (Pet. App. A, p. A13). Three of the new districts have substantial white population majorities, and two have slight black population majorities of 53.4% (District 2) and 54.0% (District 5) (Pet. App. A, p. A17). However, a majority of the voting age population in each of the five districts is white (Pet. App. A, p. A19).[5]

At the trial of this case both of plaintiffs' expert witnesses testified that it was unlikely if not impossible that black voters could ever elect candidates of their choice in any of the proposed districts, and this testimony was not contradicted by any other witness (Pet. App. C, p. A74). Defendants' only witness, the planner who drew the plan for the Board, asserted in justification for the irregular shapes of the districts that the 1969 plan had equalized county-maintained road mileage and bridges to equalize the road and bridge maintenance responsibilities of the supervisors among the five districts, that the supervisors were satisfied with this arrangement and so informed the draftsman of the plan, and that he sought to preserve this feature in the new plan as far as possible (Pet. App. C, p. A77). However, defendants' answers to plaintiffs' interrogatories showed that the proposed plan did not equalize county-maintained road mileage and bridges among the districts (Ex. P-26), and the deposition testimony of the President of the Board of Supervisors indicated that equalization of county-maintained roads and bridges had not been

[5] Because of a heavy out-migration of adult blacks from Hinds County, the percentage of blacks in the voting age population is disproportionately less than their percentage in the total population. (Pet. App. A, p. A18).

a factor in county redistricting prior to the 1969 plan, that prior inequalities of road and bridge maintenance responsibilities had not caused any difficulties in county administration, and that equalization of such factors was not necessary to efficient county government (Ex. P-25, pp. 5, 6-7, 17-18, 20-21).

After the Board had filed its new plan with the District Court, plaintiffs filed timely objections to that plan and filed an alternative redistricting plan of their own, based exclusively on Census tracts, which provided two majority-black districts which were 66.47% and 68.36% black in population within a total deviation of 3.87%. Plaintiffs' alternative plan was rejected by the District Court (Pet. App. A, p. A35).

In the 1975 county elections, all black candidates for county office were defeated. On February 24, 1976, a panel of the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court (Pet. App. B, pp. A39-A53). Plaintiffs' petition for rehearing *en banc* was granted, and on May 31, 1977 the Court of Appeals for the Fifth Circuit sitting *en banc* in an opinion by Judge John C. Godbold by a vote of 10 to 3 reversed the panel decision, reversed the judgment of the District Court, and remanded the case back to the District Court for the fashioning of a remedy (Pet. App. C, pp. A54-A104).

Applying well-established principles developed in cases alleging dilution of black voting strength in this Court and in the Fifth Circuit, the *en banc* court held that for plaintiffs to prove unconstitutional dilution it was not enough to show merely that blacks had not been elected in proportion to their numbers (Pet. App. C, p. A60). Rather, plaintiffs had the burden of proving that Hinds County blacks had less opportunity than did whites to participate in the political processes and to elect officials of their choice (*id.*, pp. A59-61).

Relying on the District Court's discussion of the extensive evidence of racial discrimination against blacks in Hinds County (*id.*, pp. A62, A80-A83) and the District Court's finding that Hinds County blacks had been subjected to racial discrimination in voting and other areas (Pet. App. A, p. A24), the Court of Appeals found that plaintiffs had demonstrated a long history of purposeful and intentional denial to blacks of equal access to the political process in Hinds County. The redistricting plan at issue here—by fragmenting a heavy black concentration in the context of racial bloc voting (*id.*, p. A73) and by denying blacks a voting age population majority in any district (*id.*, pp. A56, A74)—perpetuated that denial of equal access:

> "Plaintiffs proved a long history of denial of access to the democratic process. That history of official action is one of purposeful and intentional discrimination. The structure and the residual effects of the past have not been removed and replaced by current access. The supervisors' reapportionment plan, though racially neutral, will perpetuate the denial of access. By fragmenting a geographically concentrated but substantial black minority in a community where bloc voting has been a way of political life the plan will cancel or minimize the voting strength of the black minority and will tend to submerge the interests of the black community. The plan denies rights protected under the Fourteenth and Fifteenth Amendments." (*Id.*, pp. A78-A79.)

Under the circumstances of this case, the Court of Appeals found that the District Court gave too much weight to the "administrative convenience" of equal road and bridge responsibilities at the expense of the constitutional rights of the plaintiffs to equal opportunities for participation in the democratic process:

> "Also, in approving the supervisors' plan the district court overemphasized factors that must be subor-

dinated to the constitutional interests at stake. * * * There was simply too much emphasis on the administrative convenience of equal road and bridge responsibility at the expense of effective black minority participation in democracy [footnote omitted]. Factors such as these may be considered in redistricting but they are not talismanic. 'It is clear, however, that the mere fact that an apportionment plan may satisfy some legitimate governmental goals does not automatically immunize it from constitutional attack on the ground that it has offended more fundamental criteria.' *Robinson* v. *Commissioners Court*, 505 F.2d 674 at 680 (CA 5, 1974). Less fundamental concerns must be subordinated to the constitutional interests of the citizenry. *Avery* v. *Midland County*, *supra*, 390 U.S. at 484, 20 L.Ed. 2d at 53; *Turner* v. *McKeithen*, 490 F.2d 191, 196 n.23 (CA 5, 1973); cf. *Taylor* v. *Monroe County Board of Supervisors*, 394 F.2d 333 (CA 5, 1968)." (*Id.*, pp. A77-A78.)

Alternatively to holding the court-ordered plan unconstitutional, the Court of Appeals also held that the plan was inequitable as a court-ordered remedy for the malapportioned districts of the 1969 plan. Following the prior decisions of this Court holding court-ordered redistricting plans to higher standards than legislative plans, the court below held that the remedy ordered by the District Court here was "an abuse of its equitable remedial discretion" (*id.*, p. A79).

> "Multimember districts are objectionable because they tend to minimize or cancel the voting power of minorities. Slicing up a cohesive minority voting area in a community where there is bloc voting has the same tendency to exacerbate rather than remedy denial of access to the political process. Thus, as a matter of its remedy-fashioning power, the court could not approve a plan which tended to carry forward into the future the long-lived denial of black access to the political process." (*Id.*, pp. A79-A80.)

ARGUMENT

Introduction and Summary

The Petition in this case was filed 122 days after the judgment of the Court of Appeals was entered, or 32 days after the deadline provided by 28 U.S.C. § 2101 (c) had passed. Petitioners' effort to buy more time and further delay the final outcome of this prolonged litigation by filing a petition for rehearing *en banc* from the *en banc* decision of the Fifth Circuit should not operate to toll § 2101(c)'s ninety-day limitation for filing a petition for certiorari. Petitioners' petition for rehearing *en banc* was completely out of order and not authorized by the Federal Rules of Appellate Procedure or the Local Rules of the Fifth Circuit, and under the specific provisions of Rule 35(c), F.R. App. P., did not suspend the finality of the Court of Appeals' judgment.

But even if the Petition is deemed to have been timely filed, this case is not worthy of review by certiorari in this Court. This Court has already seen the supervisors' district lines at issue here in *Connor* v. *Finch*, Nos. 76-777, 76-933, 76-934, 76-935, decided May 31, 1977, and cited them as an example of what District Courts should avoid in court-ordered legislative redistricting plans (slip op. 15-17). Fragmentation of a heavy concentration of minority voting strength in oddly shaped districts to dilute black voting strength without adequate justification is equally impermissible in a court-ordered county redistricting plan.

Ten judges of the Court of Appeals carefully reviewed the facts of this case and the applicable legal principles and concluded that the challenged plan was both unconstitutional and inappropriate as a court-ordered plan. Even the Circuit Judge who initially wrote the panel opinion affirming the judgment of the District Court

(Gee, J.) (Pet. App. B, p. A39) concluded upon reconsideration that the panel opinion was wrong and concurred in the *en banc* decision reversing his decision for the panel (Pet. App. C, pp. A83-A90).

Petitioners concede that the Court of Appeals applied the correct legal standard in holding that in the absence of a racially motivated gerrymander, a court-ordered redistricting plan is constitutionally impermissible if it perpetuates an existent denial of access by a racial minority to the political process (Pet., p. 25). They base their argument for certiorari on what the Court of Appeals did not say about a remedy, completely misconstrue what the Court of Appeals said about the burden of proof, and make the novel contention that the Fifth Circuit's *en banc* decision conflicts with other panel decisions of the Fifth Circuit[6] and may not conflict with, but "misapprehends the applicability" (Pet., p. 17) and "is an erroneous extension of" (Pet., p. 37) decisions of this Court. In fact, all of the cases from this Court upon which petitioners rely were cited in the Fifth Circuit's opinion and fully considered by the ten judges of the majority in reaching their decision.

No amount of picking and straining at what the Fifth Circuit said or did not say can detract from this fundamental and preeminent fact: the county redistricting plan at issue here is a racially discriminatory plan which guts the voting strength of the newly-enfranchised black voters of Hinds County and, in the face of undisputed evidence of an extensive past history of racial discrimination and exclusion from the political process, effectively deprives them of the opportunity to elect officials of their

[6] The resolution of conflicts of decisions within a circuit is not one of the considerations established by this Court governing review on certiorari. Sup. Ct. Rule 19. Resolution of such conflicts is one of the purposes of *en banc* rehearing by the Court of Appeals. Rule 35(a), F.R. App. P.

choice in any district. No important Federal question is presented which this Court has not already passed upon in other cases, and the decision here is fully consistent—and there is no conflict—with the prior decisions of this Court in other cases.

I. THE PETITION SHOULD BE DENIED BECAUSE IT WAS UNTIMELY FILED.

The judgment of the Court of Appeals was entered on May 31, 1977, the date the *en banc* decision of the Court of Appeals was rendered (Pet. App. C, p. A54; Pet. App. D, p. A106). Under 28 U.S.C. § 2101(c), petitioners had ninety days from the entry of such judgment to file their petition for a writ of certiorari, or until August 29, 1977. Petitioners in fact did not file their petition for a writ of certiorari until September 30, 1977, thirty-two days after the § 2101(c) deadline had passed. No application for an extension of time within which to file was sought or granted. Since the time for filing a petition in a civil action is statutory, and is not prescribed by Rule of this Court, the Petition "must . . . be denied for want of jurisdiction." *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

Petitioners contend that the time for filing their Petition was extended when, after the *en banc* decision of the Fifth Circuit was announced and its judgment entered, petitioners filed a document with the Fifth Circuit styled "Petition for Rehearing En Banc on Behalf of Defendants-Appellees" (Pet., p. 2). In other words, defendants contend that they could—to obtain more time and to delay further the final outcome of this prolonged litigation—unilaterally extend the time for filing their certiorari petition by filing a petition for rehearing *en banc* from the *en banc* decision of the Fifth Circuit.

This contention must fail. Normally the filing of a proper and timely petition for rehearing does toll the

running of the time within which to petition for certiorari. The rationale for this doctrine is that the petition for rehearing operates to suspend the finality of the lower court's judgment pending the court's further determination whether the judgment should be modified, *Department of Banking* v. *Pink*, *supra*, 317 U.S. at 266. But this general principle is not applicable here for several reasons. First, neither the Federal Rules of Appellate Procedure nor the Local Rules of the Court of Appeals for the Fifth Circuit allow the filing of a petition for rehearing *en banc* from an *en banc* judgment of the court.[7] Once the Court of Appeals granted plaintiffs' petition for rehearing *en banc* in 1976 and reheard the case *en banc*, its *en banc* deliberations were final and the defendants (petitioners here) had been accorded the benefit of an *en banc* rehearing of the case. Thus, defendants' post-*en banc* decision to petition for rehearing *en banc* was in the nature of a second petition for rehearing which is not authorized by the Federal Rules of Appellate Procedure nor the Local Rules of the Fifth Circuit. *F.H.E. Oil Co.* v. *Commissioner*, 150 F.2d 857 (5th Cir. 1954); *Sun Oil Co.* v. *Burford*, 130 F.2d 10 (5th Cir. 1942), *rev'd on other grounds*, 319 U.S. 315 (1943).

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[7] Although the Clerk of the Fifth Circuit filed petitioners' alias petition for rehearing *en banc* and although the Court of Appeals entered an order denying the petition, petitioners cannot contend that their petition was received and considered on its merits. Since the *en banc* court gave no reason for denying petitioners' petition, the court might well have denied the petition for the wholly procedural reasons that it was unauthorized by the Rules and that the court was without jurisdiction to consider a petition for rehearing *en banc* from an *en banc* decision of the court. But even if the Court had discretion to entertain the petition, it certainly was not bound to. At best, therefore, petitioners' decision to file the unauthorized rehearing petition was at their own risk; their decision bought them no additional time under the applicable rules and statutes.

Second, Rule 35(c), F.R. App. P., governing suggestions for rehearing *en banc* specifically provides: "The pendency of such a suggestion [for rehearing *en banc*] whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate." Thus, under the specific provisions of Rule 35(c), petitioners' petition for rehearing *en banc* did not operate to suspend the finality of the lower court's judgment and therefore did not toll the time within which petitioners were required to file their Petition for Writ of Certiorari.

The burden is on petitioners to establish that their Petition for Writ of Certiorari was timely filed and that this Court has jurisdiction to consider it. This they have failed to do.

II. THE DECISION BELOW IS CLEARLY CORRECT.

The court-ordered redistricting plan at issue here is a classic example of what this Court warned District Courts to avoid in court-ordered state legislative redistricting in *Connor* v. *Finch*, Nos. 76-777, 76-933, 76-934, 76-935, decided May 31, 1977 (slip op. pp. 15-17)—odd-shaped districts which fragment a heavy black population concentration and minimize and cancel out the voting strength of a racial minority group. Indeed, these are the very districts cited by this Court in *Connor* as an example of what Districts Courts should avoid. When minority group concentrations are sliced up like a piece of apple pie and spread out among several districts, newly-enfranchised voters can be effectively deprived of the opportunity to elect any officials of their choice. For this reason, redistricting plans which fragment and disperse a minority group concentration and dilute minority voting strength in the face of a prior history of discrimination and without adequate justification have been struck down by the courts, and such fragmentation has

been condemned by commentators as a racial gerrymandering technique. *Cf. Taylor* v. *McKeithen*, 407 U.S. 191 (1972); *Robinson* v. *Commissioners Court*, 505 F.2d 674 (5th Cir. 1974); *Moore* v. *Leflore County Bd. of Election Comm'rs*, 361 F.Supp. 603 (N.D. Miss. 1972), *aff'd*, 502 F.2d 621 (5th Cir. 1974); *Klahr* v. *Williams*, 339 F. Supp. 922 (D. Ariz. 1972) (three-judge court); Clinton, *Further Explorations in the Political Thicket*, 59 IOWA L. REV. 1, 4 (1973); Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 402ff. (1973).

III. THERE IS NO CONFLICT OF DECISION.

The petition for writ of certiorari misconstrues and distorts the decision of the Court of Appeals in several significant respects to attempt to create issues which are not in fact present in this case.

First, petitioners argue with what the Court of Appeals did not say. Petitioners contend that—although the Fifth Circuit did not say so—the "indirect, yet unmistakable, direction" (Pet., p. 17) of the Court of Appeals is that on remand the District Court should fashion a racial gerrymander to insure Hinds County blacks proportional representation on the Board of Supervisors (*id.*). In fact, given its extensive discussion of the offensive aspects of the court-ordered plan in this case, the Fifth Circuit majority plainly considered it unnecessary to give any specific directions to the District Court on the fashioning of a new remedy. Certainly it is clear that the Court of Appeals did not intend to imply what petitioners attribute to it, since the lower court's decision rejects outright the notion that Hinds County blacks are constitutionally entitled to proportional representation (Pet. App. C, p. A60) and eschews any such "simplistic" or "mechanical" solutions (*id.*, p. A80). Since no such directions on the fashioning of a remedy were

given, there is no conflict with the decision of this Court in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and the opinion below does not "misapprehend the applicability of" (Pet., p. 22) *United Jewish Organizations of Williamsburg, Inc.* v. *Carey*, 430 U.S. 144 (1977).

Second, petitioners completely misconstrue what the Court of Appeals did say about who has the burden of proof on whether Hinds County blacks have been denied equal access to the political process (Pet., pp. 24-27). Following this Court's decisions in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *White* v. *Regester*, 412 U.S. 755 (1973), the Fifth Circuit held that in the absence of a racially motivated gerrymander, a redistricting scheme which perpetuates a past denial to blacks of equal access to the political process offends constitutional guarantees. Petitioners admit that this is the correct legal standard (Pet., p. 25). In accordance with the above-cited decisions, the Fifth Circuit held that it was not enough for plaintiffs merely to show a disparity between the percentage of blacks in the population and the number of black elected officials (Pet. App. C, p. A60). Rather, the Fifth Circuit held in clear and unmistakable language that the plaintiffs had the burden of producing evidence to support findings that Hinds County blacks "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice" (*id.*, p. 59A, *quoting from White* v. *Regester*, *supra*, 412 U.S. at 766).

Weighing the undisputed facts of this case in accordance with the standards developed by this Court, the Fifth Circuit correctly determined that "the plaintiffs established a long-existent history of sweeping and pervasive denial of access to the democratic political process and of official unresponsiveness to the needs of blacks" (*id.*, p. A67).

Thus, contrary to petitioners' argument, the Fifth Circuit did not hold that the initial burden of proof fell

upon defendants to prove present equality of access for blacks to the political process, but rather held that the initial burden fell upon the plaintiffs to prove inequality of access. What the Fifth Circuit did hold was that once plaintiffs had met their burden,

> "it then fell to the defendants to come forward with evidence that enough of the incidents of the past had been removed, and the effects of past denial dissipated, that there was presently equality of access [footnote omitted]." (Pet. App. C, p. A64.)

The notion that once plaintiffs have proven that black voters have been and are denied equal access to the political process, the burden shifts to defendants to refute such evidence is nothing new and certainly cannot be characterized as contrary to any decisions of this Court or such a departure from the accepted and usual course of judicial proceedings as to require review by this Court. Indeed, the Fifth Circuit's approach is wholly consistent with that adopted by this Court in similar contexts. *Mt. Healthy School Dist. Bd. of Education* v. *Doyle*, 429 U.S. 274, 287 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270-71, n.21 (1977).

On the question of proving unequal access to the political process, petitioners argue that it was improper for the lower court to infer that inequality of access derives from—among other factors—economic and educational inequalities (Pet., pp. 28-29).[8] But this inference, so strongly attacked by petitioners, is nothing new and comes straight out of *White* v. *Regester*, *supra*, 412 U.S. at 768-70. In *White*, in support of its conclusion that Mexican-Americans had been and were being denied equal access to the political process in Bexar County,

[8] Petitioners also contend that this inference was then used as a "springboard" for further inferences (Pet., p. 29), but fail to specify what further inferences were drawn.

Texas, this Court cited findings by the District Court that the Mexican-American community had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others" (*id.* at 768).

The principle that low socio-economic status and deprivations in education, income, employment and other areas have a negative impact on opportunities for political participation is not only accepted as a matter of law, but also is firmly established by numerous studies in political science. *See, e.g.*, L. MILBRAIGHT, POLITICAL PARTICIPATION, ch. V (1965); W. Erbe, *Social Involvement and Political Activity: A Replication and Elaboration*, 29 AM. SOCIOLOGICAL REV. 198 (1964); A. CAMPBELL *et al.*, THE AMERICAN VOTER, ch. 17 (1960); A. CAMPBELL, G. GURIN, & W. MILLER, THE VOTER DECIDES 187-99 (1954).

But in this case the notion that inequality of access flows from depressed socio-economic conditions is more than an inference. Dr. James W. Loewen, a political sociologist familiar with the condition of blacks in Hinds County, testified at trial in detail how, because of their disadvantaged socio-economic position, Hinds County blacks are disadvantaged in the political process and have less access (Tr. 244-48). This testimony was not refuted by any of defendants' evidence.

What other inferences could be drawn? Certainly there is nothing in this case to support the inference that because Hinds County blacks have been unlawfully discriminated against for the past 100 years—and because they continue to suffer the political, educational, economic, and employment deprivations of 100 years of discrimination—they have equal or better opportunities than the privileged white majority to participate in the politi-

cal processes and to elect legislators of their choice. Petitioners' contentions here are totally without merit.

Third, petitioners distort the handling by the Court of Appeals of the factual conclusions of the District Court under the "clearly erroneous" standards of Rule 52(a), F.R. Civ. P. (Pet., pp. 30-33). Under Rule 52(a), the appellate court may set aside findings of fact only if they are "clearly erroneous." Petitioners contend that the appellate court failed properly to apply the "clearly erroneous" standard to fact-finding by the District Court. Here petitioners fail to distinguish between "subsidiary facts," involving a determination of an evidentiary or primary fact and to which the clearly erroneous rule applies, and "ultimate facts," which are really factual conclusions often involving mixed fact and law determinations which "may involve the very basis on which judgment of fallible evidence is to be made," *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944), and to which the clearly erroneous standard does not apply, *Baumgartner, supra; cf. East* v. *Romine, Inc.*, 518 F.2d 332, 338-39 (5th Cir. 1975); *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975).

Thus, the only example which petitioners cite, the finding by the District Court that its redistricting plan gives black voters a realistic opportunity to elect officials of their choice in Districts 2 and 5, is really an ultimate fact or factual conclusion involving mixed fact-law determinations. The Court of Appeals held that this conclusion "will not stand examination" because the District Court (1) applied an erroneous legal standard by giving improper weight to total population statistics and by neglecting the other measures of access to the political process (Pet. App. C, p. A75); (2) based its conclusion on entirely speculative manipulations of the statistical evidence given by plaintiffs' experts which were "too attenuated" (*id.*); and (3) failed to give consideration to

the prior decisions of this Court holding court-ordered plans to higher standards than legislatively enacted plans (*id.*, pp. A76-A77).

Thus, contrary to petitioners' allegations, the appeals court did not substitute its own fact-finding for the findings of evidentiary facts by the District Court, but rather, accepting the "subsidiary facts" found by the District Court, merely found that the District Court's conclusions from the evidence were improper and erroneous as a matter of law.[9]

Petitioners next contest the principle followed by the Fifth Circuit that a court-ordered reapportionment plan must be held to higher standards than a legislative plan (Pet., pp. 34-37). Although petitioners recognize that this is the law established by this Court in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), and *Chapman* v. *Meier*, 420 U.S. 1 (1975),[10] they contend that this rule is applicable only to challenges to multimember and malapportioned districts, and that this Court has never applied the principle to challenges based upon dilution of black voting strength.

Petitioners' contentions are based upon a misreading of these cases and *Connor* v. *Finch*, Nos. 76-777, 76-933,

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[9] Similarly, contrary to petitioners' charge that the appeals court failed to give "any weight" to facts which the District Court properly judicially noticed (Pet., pp. 33-34), the Fifth Circuit found that some, such as the District Court's apathy theory, were not as a matter of law and common sense properly the subject of judicial notice (Pet. App. C, pp. A65-A66), and that others—such as the District Court's conclusion that white elected officials were responsive because they complied with the numerous court orders entered in Hinds County civil rights cases—were not supported by the evidence, were erroneous as a matter of law, showed only that litigation was necessary to remove the discrimination and that the "litigation has worked" (Pet. App. C, p. A66).

[10] *Chapman* establishes that "[a] court-ordered plan must, however, be held to higher standards than a State's own plans." 420 U.S. at 26.

76-934, 76-935, decided May 31, 1977. In *Connor* the Court not only reiterated its prior teachings that court-ordered plans must avoid multi-member districts and achieve population equality with little more than *de minimis* variations, but also—using the Hinds County example—counselled against unjustified dilution of black voting strength in court-ordered plans:

> "Such unexplained departures from the results that might have been expected to flow from the District Court's own neutral guidelines can lead, as they did here, to a charge that the departures are explicable only in terms of a purpose to minimize the voting strength of a minority group. * * * It is . . . imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges [footnote omitted]." Slip op. at 18.

The rationale for avoiding unjustified dilution of black voting strength in court-ordered plans is obvious. As the Court of Appeals noted (Pet. App. C, pp. A79-A80), one of the reasons given by this Court for its preference for single-member districts in court-ordered plans is that multi-member districts frequently tend to minimize or cancel out minority voting strength. *Connor* v. *Finch*, *supra*, slip op. at 8 (single-member districts preferred because multi-member districts "tend to submerge electoral minorities and over-represent electoral majorities"); *Chapman* v. *Meier*, *supra*, 420 U.S. at 16-19. Similar and equally destructive dilution can be accomplished in a court-ordered plan which slices up a cohesive concentration of minority voting strength without adequate justification.[11]

[11] The Court of Appeals did not say, as petitioners contend (Pet., p. 37), that consideration of equalization of county-maintained road mileage and bridges could not be considered in redistricting, but only that these administrative considerations could not take precedence over plaintiffs' constitutional rights (Pet. App. C, pp. A77-A78). See *Avery* v. *Midland County*, 390 U.S. 474, 484 (1968).

Thus, the principles followed by the lower court in holding that the District Court's plan constituted an abuse of discretion not only were not an erroneous extension of the teachings of this Court in *East Carroll Parish* and *Chapman*, but were fully and completely consistent with the principles announced in those cases and in *Connor* v. *Finch*.

Finally, petitioners contentions that the Fifth Circuit's decision "misapprehends the proper application" of and conflicts with *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (Pet., pp. 38-40) cannot withstand scrutiny and overlook the lengthy discussion by the Court of Appeals of these cases. The Fifth Circuit carefully and extensively analyzed the teachings of those cases and applied them to the facts presented here (Pet. App. C, pp. A68-A72). Indeed, the Fifth Circuit's discussion of the issue of official purpose and intent takes up five printed pages as reproduced in the Appendix to the Petition. Not one of the three dissenting judges suggested any conflict between the majority's opinion and *Washington* or *Arlington Heights*.

Assuming that *Washington* and *Arlington Heights* were applicable to this case, the Fifth Circuit found that the undisputed facts showed that the past exclusion of and discrimination against Hinds County black people from equal access to the political process "was purposeful and intentional" and "unexplainable on any grounds other than race" (Pet. App. C, p. A62). Then, after carefully analyzing the criteria of *Washington* and *Arlington Heights*, the Fifth Circuit found that it "is not open to doubt" that this redistricting plan "was the instrumentality for carrying forward patterns of purposeful

and intentional discrimination that already existed in violation of our Constitution" (*id.*, p. A70).

Thus, just as this Court found in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 205 (1973)—a case cited and relied upon in both *Washington* (at 240) and *Arlington Heights* (at 265)—that a constitutional violation would be shown by "a current condition of segregation resulting from intentional state action," so the Fifth Circuit found here that this plan would unconstitutionally perpetuate a current condition of exclusion from the democratic process resulting from intentional state action. *See also, Wright* v. *City of Emporia*, 407 U.S. 451, 460 (1972) (discussed in *Washington* v. *Davis*, at 243.); *Green* v. *County School Board*, 391 U.S. 430, 438 (1968) (freedom of choice plan which perpetuates intentional and purposeful school segregation unacceptable). The Fifth Circuit was careful to distinguish the claims rejected in such cases as *Whitcomb* v. *Chavis*, *supra*, and eschewed any reliance merely on the "effect" of the plan, but rather noted that the plaintiffs in *White* v. *Regester*, *supra*, had been successful "because they established the requisite intent or purpose in the form of the existent denial of access to the political process" (Pet. App. C, p. A72).

Under these circumstances, it is not determinative that defendants' planner denied any racially discriminatory purpose in drawing the plan. *Cf. Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45-46 (1971). Mere denials of an intent to discriminate in drawing the redistricting plan are insufficient. *Cf. Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972). Thus, even if the plan were drawn in a racially neutral manner, as petitioners contend, it is still unconstitutional under the controlling decisions of this Court if it perpetuates a prior intentional and purposeful denial to blacks of equal access to the political process.

But in addition to finding the plan unconstitutional, the Fifth Circuit also found that the District Court's approval of this plan as a court-ordered plan constituted an abuse of discretion (Pet. App. C, pp. A79-A80). As the previous discussion points out, *Connor*, *East Carroll Parish*, and *Chapman* all make clear that a court-ordered plan must be held to higher standards than a legislative plan. Thus, even if the court-ordered plan is not unconstitutional according to the standards governing the constitutionality of legislative plans, the plan is still invalid under the standards applicable to court-ordered plans for the reasons stated by the Court of Appeals.

Petitioners have failed to show that this case satisfies any of the considerations established by this Court calling for review on writ of certiorari. For the above-stated reasons, this case fails to present any new, special, or important issues which have not already been resolved by this Court. The decision of the Court of Appeals is not in conflict with any decisions of this Court nor does it depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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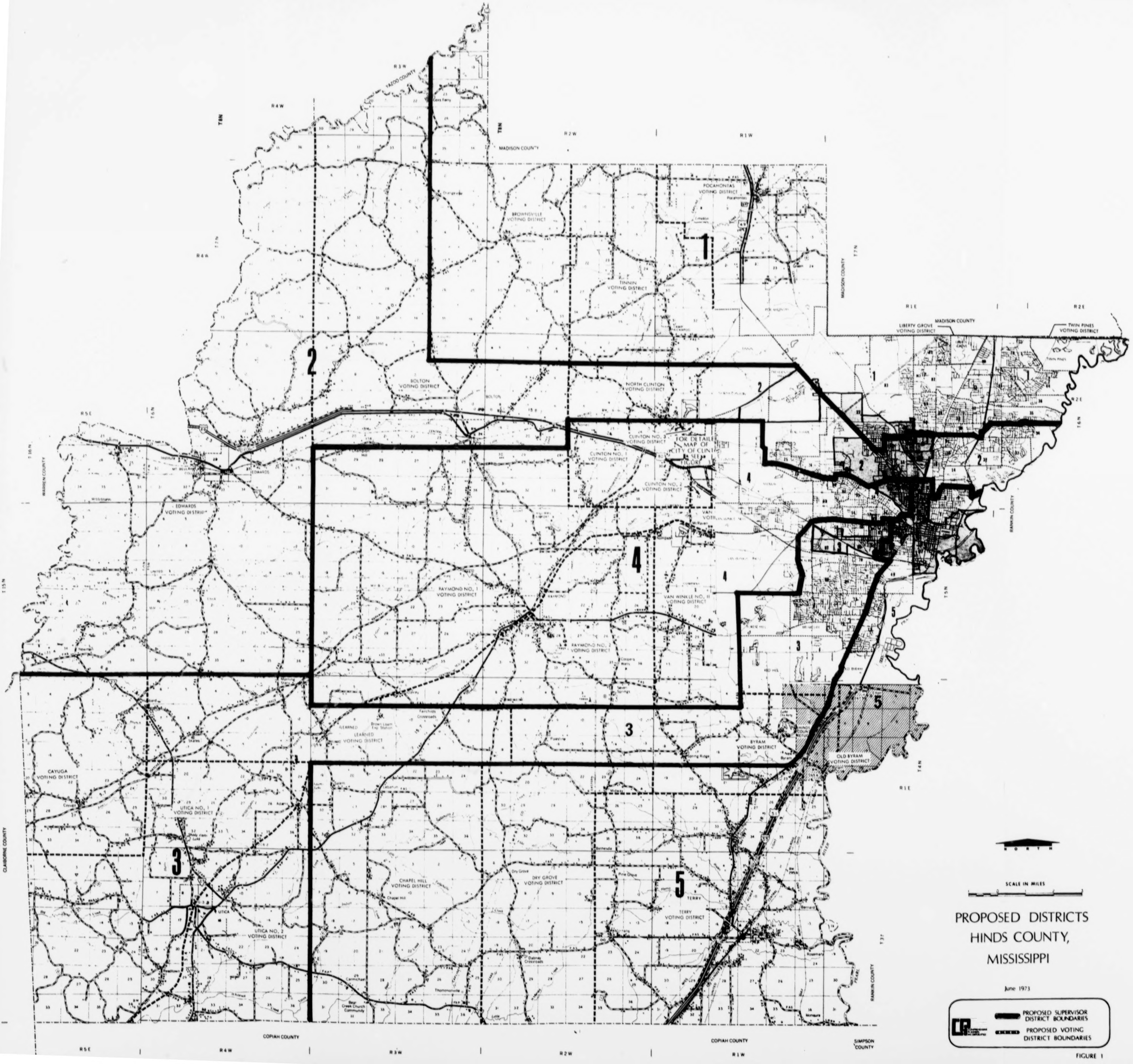
October 28, 1977



PROPOSED DISTRICTS HINDS COUNTY, MISSISSIPPI

June 1973

PROPOSED SUPERVISOR DISTRICT BOUNDARIES

PROPOSED VOTING DISTRICT BOUNDARIES

FIGURE 1

In the Supreme Court of the United States

No. 77 - 499

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL.,
Petitioners,

vs.

HENRY J. KIRKSEY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED.

Petitioners in accordance with subsection 4 of Rule 24 of the Revised Rules of the Supreme Court of the United States file this their reply brief addressed to an argument first raised in the brief in opposition filed by the Respondents in this cause. Respondents in their brief incorrectly argue that the

Petition for Writ of Certiorari filed in this cause was untimely filed.

The facts showing the timeliness of the filing of the Petition for Writ of Certiorari herein are as follows:

The District Court in Kirksey, et al. v. Board of Supervisors of Hinds County, Mississippi, et al., 402 F.Supp. 658 (S.D. Miss. 1975) adopted the 1973 Board plan for the redistricting of the five supervisors' districts of Hinds County, Mississippi. The Plaintiffs, Kirksey and others, appealed to the United States Court of Appeals, Fifth Circuit. The Fifth Circuit panel opinion affirmed the action of the trial court. Kirksey, et al. v. Board of Supervisors of Hinds Co., Miss., et al., 528 F.2d 536 (5th Cir. 1976). The Fifth Circuit granted the Plaintiffs-Appellants' petition for rehearing en banc. On rehearing en banc, the Court of Appeals, Fifth Circuit, with three Judges dissenting on May 31, 1977, reversed the panel decision. Kirksey, et al. v. Board of Supervisors of Hinds Co., Miss., et al., 554 F.2d 139 (5th Cir. 1977). The Fifth Circuit in a letter from the office of the Clerk dated May 31, 1977, mailed to the counsel for the Board a copy of the Court's decision. This May 31, 1977, letter, a copy of which is attached to this brief as Appendix "A", stated:

> "Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.
>
> "Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing

and mandates, respectively. A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the Petition in the mail on the 14th day will not suffice."

Rule 40 of the Rules of Appellate Procedure provides in part as follows:

> "(a) A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. . . ."

Within 14 days after May 31, 1977, a Petition for Rehearing en banc On Behalf of Defendants-Appellees was accepted and filed by the Clerk of the Fifth Circuit. The Plaintiffs-Appellants, Respondents herein, themselves recognized the right of the Defendants-Appellees, Petitioners herein, to file their petition for rehearing in a letter to the Court dated June 21, 1977, a copy of which letter is attached to this brief as Appendix "B". In their June 21, 1977, letter the Plaintiffs-Appellants stated: "Since the defendants have filed a petition for rehearing en banc from the en banc decision of the Court in the above-styled case, I am obliged to bring to the attention of the Court the recent decision of the United States Supreme Court in Conner v. v. [sic] Finch. . . ." The Plaintiffs-Appellants asked that copies of their June 21, 1977, letter be distributed to the Judges of

the Court, and at no time did they object in any manner to the filing of the petition for rehearing by the Defendants. On July 22, 1977, the Fifth Circuit entered a Per Curiam decision on the petition for rehearing. A copy of that decision is attached hereto as Appendix "C". The Fifth Circuit therein stated: "IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied." Again no indication was given that either the Court or the Plaintiffs-Appellants considered that the Defendants could not file their petition for rehearing. It is particularly interesting to note that the Fifth Circuit withheld the issuance of the mandate in this case until August 8, 1977. On September 30, 1977, less than ninety days after July 22, 1977, the Petitioners filed their Petition for Writ of Certiorari with the Clerk of this Court. 28 U.S.C. § 2101(c).

On pages 13-4 of the Brief for Respondents in Opposition, the Respondents admit that "[N]ormally the filing of a proper and timely petition for rehearing does toll the running of the time within which to petition for certiorari." As long ago as 1894 and even earlier, the United States Supreme Court in such cases as Northern Pacific Railroad Company v. Holmes, 155 U.S. 137, 15 S.Ct. 28, 39 L.Ed. 99 (1894) stated:

> "It is well settled that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of

> error or appeal. Aspen Min. & Smelt Co. v. Billings, 150 U.S. 31, 36 [37: 986, 988]; Voorhees v. John T. Noye Mfg. Co. 151 U.S. 135 [38: 101]."

155 U.S. at 138, 15 S.Ct. at 29, 39 L.Ed. at 99

Texas Pacific Railway Co. v. Murphy, 111 U.S. 488, 4 S.Ct. 497, 28 L.Ed. 492 (1884); United States v. Ellicott, 223 U.S. 524, 32 S.Ct. 334, 56 L.Ed. 535 (1912); and Citizens' Bank of Michigan City v. Opperman, 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919).

On page 13 of the Brief for Respondents in Opposition, the Respondents cite Department of Banking v. Pink, 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942) reh. den. 318 U.S. 802, 63 S.Ct. 850, 87 L.Ed. 1166 (1943). However, the Petitioners submit that the decision in the Pink case, supra, clearly shows that their Petition for Writ of Certiorari was timely filed in the present case. The Supreme Court in Pink, supra, stated:

> "A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. . . ."

317 U.S. at 266, 63 S.Ct. at 234, 87 L.Ed. at 256

This Court in Rule 23 of the Revised Rules of the Supreme Court of the United States itself recognizes the above statement of law. Rule 23 1. (b) (ii) provides that the jurisdictional statement in a petitioner's petition for writ of certiorari, in addition to the date of the judgment to be reviewed and the time of its entry, shall show "[t]he date of any order respecting a rehearing". Clearly the filing of a timely petition for rehearing in the Fifth Circuit by the Petitioners herein tolled the running of the ninety day period provided for in 28 U.S.C. section 2101(c). Thus the ninety day period did not begin to run until July 22, 1977, when the Fifth Circuit denied the petition for rehearing.

However, the Respondents in the present case erroneously argue that the petition for rehearing filed by the Petitioners in the Fifth Circuit was "in the nature of a second petition for rehearing which is not authorized by the Federal Rules of Appellate Procedure nor the Local Rules of the Fifth Circuit." The petition for rehearing filed by the Petitioners in the Fifth Circuit was not a second petition for rehearing, but was the first and only petition for rehearing filed by them or anyone else to review the May 31, 1977, decision and judgment of the Fifth Circuit, which for the first time held that the 1973 Board plan would continue in effect an existent denial of access to the political process by blacks in Hinds County.

The cases cited by Respondents are inapplicable to the present case. The Respondents cite F. H. E. Oil Co. v. Commissioner of Internal Revenue, 150 F.2d 857 (5th Cir. 1945). In order to understand the ruling in that case it is necessary to

look back at the former opinions in the case appearing at 147 F.2d 1002 and 149 F.2d 238. The case [147 F.2d 1002] came to the Fifth Circuit on petitions by the taxpayers for review of a decision of the Tax Court of the United States (District of Texas). The Fifth Circuit affirmed the judgment of the Tax Court disallowing the taxpayers certain deductions. The taxpayers then filed a motion for rehearing that was denied [149 F.2d 238]. These same taxpayers then filed yet another motion for rehearing, which the Fifth Circuit held was not provided for by the rules of the court. In comparison with the facts of the present case, it is clear that the petition for rehearing filed by the Petitioners herein in the Fifth Circuit was a first petition for rehearing, not a second or successive petition by the same parties seeking review of the same decision of the court.

The Respondents next cite Sun Oil Company v. Burford, 130 F.2d 10 (5th Cir. 1942). This case like F. H. E. Oil Co. v. Commissioner of Internal Revenue, supra, is distinguishable from the case at bar in that the petition for rehearing in Burford, supra, was a second or successive petition by the same parties seeking review of a single decision of the court. An additional interesting thing to note about the Burford case, supra, is that although the Fifth Circuit announced that their rules did not contemplate a second petition for rehearing, the court allowed the second petition to be filed. The Fifth Circuit in Burford, supra, announced that it had full control over its orders and judgments during the term at which they were rendered and even went so far as to order the mandate that had already been sent down recalled and to proceed to a consideration of the second petition for rehearing on its merits.

The Fifth Circuit in Sun Oil Company v. Burford, supra, cites City of Stuart v. Green, 91 F.2d 603, 605 (5th Cir. 1937) in support of its statement that its rules do not comtemplate a second petition for rehearing. On July 15, 1937, the Fifth Circuit reversed the judgment of the lower court in Green, supra. The Appellee then made an application for rehearing, which was denied on August 13, 1937. Then on September 3, 1937, after the mandate had gone down,the Appellee sought to file another application for rehearing. Thus, it is very clear that when the courts have discussed second petitions for rehearing, they are referring to successive petitions by the same party or parties seeking review of the same decision or judgment of the court. The petition for rehearing filed in the Fifth Circuit by the Petitioners herein was not such a second petition for rehearing, but was a first petition duly authorized by Rule 41 of the Rules of Appellate Procedure as recognized by the Respondents and the Fifth Circuit.

In addition, as noted in the Burford case, supra, the Fifth Circuit had control over its May 31, 1977, judgment during the term at which it was issued. It had the right to and did consider the petition for rehearing on its merits, denying the same on July 22, 1977. In Frieze v. West American Insurance Company, 190 F.2d 381 (8th Cir. 1951) the Eighth Circuit allowed a second petition for rehearing to be filed in order that it might be passed on by the court. In the present case the Fifth Circuit could and did permit the filing of the Petitioners' petition for rehearing and, after considering the merits of the petition for rehearing, denied the petition. As stated by the Supreme Court in Bowman v.

Loperena, 311 U.S. 262, 61 S.Ct. 201, 85 L. Ed. 177 (1940):

> ". . . The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof. [Emphasis added.]
>
> 311 U.S. at 266, 61 S.Ct. at 203-4, 85 L.Ed. at 180

Thus, even if the Petitioners' petition for rehearing was untimely, which clearly it was not as previously shown, since the Fifth Circuit allowed the filing of the petition for rehearing and, only after considering the merits of the petition, denied the same on July 22, 1977, the judgment did not become final until that date, and the time for filing of the petition for writ of certiorari began to run July 22, 1977.

Respondents further cite Rule 35(c) of the Federal Rules of Appellate Procedure dealing with suggestions for rehearing en banc, which provides that the pendency of a suggestion does not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate. The Respondents incorrectly contend that under

Rule 35(c) the filing of the Petitioners' petition for rehearing did not suspend the finality of the lower court judgment. The Advisory Committee Note to Rule 35 states in part as follows:

> "In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled 'petition for rehearing in banc.' Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides."

Thus, the pendency of a suggestion does not affect the finality of the judgment of a court of appeals; however, the filing and pendency of a petition for rehearing does affect the finality of such a judgment and tolls the running of the time for the filing of a petition for writ of certiorari. As noted by the Advisory Committee above the document filed by the Petitioners herein in the Fifth Circuit was a petition for rehearing, which did toll the running of time for the filing of a petition for writ of certiorari until July 22, 1977, when the petition for rehearing was denied by the Fifth Circuit.

CONCLUSION

As shown by the foregoing discussion, the petition for writ of certiorari filed in this case by the Petitioners was timely filed. Therefore, the Petitioners again respectfully pray that this Court will review the present case on writ of certiorari.

Respectfully submitted,

THOMAS H. WATKINS
800 Plaza Building
Post Office Box 650
Jackson, Mississippi 39205

ATTORNEY FOR PETITIONERS

Of Counsel:

WATKINS & EAGER
800 Plaza Building
Post Office Box 650
Jackson, Mississippi 39205

CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Petitioners, hereby certify that on this, the 9th day of November, 1977, three copies of the foregoing Reply Brief of Petitioners were mailed, postage prepaid, to Frank R. Parker, Esquire, Lawyers' Committee for Civil Rights Under the Law, Suite 720, Milner Building, Jackson, Mississippi, 39201, attorney of record for Respondents, and that three copies of said Reply Brief were mailed, postage prepaid, to Jessica Silver, Esquire, Appeals Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C., 20530, attorney for the United States. I further certify that all parties required to be served have been served.

Thomas H. Watkins

THOMAS H. WATKINS

ATTORNEY FOR PETITIONERS

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS LA 70130

May 31, 1977

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 75-2212 - KIRKSEY, ET AL. VS. BOARD OF SUPERVISORS OF HINDS COUNTY, MISS., ET AL.

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.

Local Rule 15 provides that "A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Ann Barré
Deputy Clerk

enc.

cc: Mr. Frank R. Parker
Mr. Herman Wilson
Ms. Jessica Dunsay Silver
Mr. Thomas H. Watkins
Mr. John M. Putnam
Mr. William Allain

APPENDIX "A"

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 720 • 210 SOUTH LAMAR STREET • JACKSON, MISSISSIPPI 39205 • PHONE (601) 948-5400

MAILING ADDRESS: P.O. BOX 1971

June 21, 1977

Mr. Edward W. Wadsworth, Clerk
United States Court of Appeals
For the Fifth Circuit
600 Camp Street, Room 102
New Orleans, Louisiana 70130

Re: Kirksey v. Board of Supervisors of Hinds County, Mississippi, No. 75-2212

Dear Mr. Wadsworth:

Since the defendants have filed a petition for rehearing en banc from the en banc decision of the Court in the above-styled case, I am obliged to bring to the attention of the Court the recent decision of the United States Supreme Court in Connor v. v. Finch, 45 U.S.L.W. 4528 (U.S. decided May 31, 1977) (Nos. 76-777, 76-934, 76-935), which has a bearing on and which is entirely consistent with this court's decision in the above-styled case.

As Judge Coleman points out in his separate dissenting opinion in Kirksey, Connor--the Mississippi legislative reapportionment case--also involved the issue of the Hinds County supervisors' districts at issue in Kirksey because those districts were selected by the Connor court as senatorial districts for Hinds County and were challenged by plaintiffs and the United States as plaintiff-intervenor in the Connor appeal as racially discriminatory. The Supreme Court's opinion in Connor was rendered the same day as this Court's opinion in Kirksey, and the United States Supreme Court in its opinion states that the use of the Hinds County supervisors' districts as senatorial districts raises serious questions of "impermissible racial dilution."

In Part III of its opinion, the Supreme Court in Connor specifically cites use of the county supervisors' districts of Hinds County as senatorial districts as one example which raised serious questions of racial gerrymandering in the District Court's state legislative reapportionment plan:

APPENDIX "B"

"To support their claim of impermissible racial dilution,[22] the plaintiffs point to unexplained departures from the neutral guidelines the District Court adopted to govern its formulation of a reapportionment plan-departures which have the apparent effect of scattering Negro voting concentrations among a number of white majority districts. They point in particular to the District Court's failure adequately to explain its adoption of irregularly shaped districts when alternative plans exhibiting contiguity, compactness, and lower or acceptable population variances were at hand. The plaintiffs have referred us to two types of situations in which the District Court's decree fails to meet its own goal that legislative districts be reasonably contiguous and compact: in its subdivisions of large counties whose population entitles them to elect several legislative representatives to both houses, and in its aggregations of smaller counties to put together enough people to elect one legislator.

"Hinds County exemplifies the large county problem.[23] It is the site of the State's largest city, Jackson, and is the most populous Mississippi county, with a total of 214,973 residents, 84,064 of whom are Negroes. As are all Mississippi counties, Hinds is divided into five supervisory districts or "beats"; each beat elects one supervisor to sit on the Board of Supervisors, which is charged with executive and judicial local government

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[22]See, e.g., White v. Regester, 412 U.S. 755; Whitcomb v. Chavis, 403 U.S. 124; Abate v. Mundt, 403 U.S. 182, at 184 n. 2; Burns v. Richardson, 384 U.S. 73, 88-89; Fortson v. Dorsey, 379 U.S. 433, 439.

[23]The textual examples are meant to be illustrative rather than an exhaustive catalogue of possible deficiences in the District Court's plan. Similar criticisms could possibly be made of the districting contours in a number of other counties.

responsibilities. The Board of Supervisors re-apportioned itself in 1969, creating five oddly shaped beats that extend from the far corners of the county in long corridors that fragment the city of Jackson, where much of the Negro population is concentrated. See Kirksey v. Board of Supervisors of Hinds County, 402 F. Supp. 658 (SD Miss.), aff'd 528 F.2d 536 (CA5), rehearing en banc pending, No. 75-2212. The irregular shapes of the beats were assertedly justified as necessary to achieve equalization of road mileage, bridges and land area among the districts, so as to equalize the primary responsibilities of the supervisors-maintenance of the roads and bridges.[24] Whatever may be the validity of those justifications for a Hinds County Board of Supervisors' apportionment first adopted in 1969, they are irrelevant to the problem of apportioning State Senate seats, whose holders will presumably concern themselves with something other than maintaining roads and bridges. The District Court nevertheless concluded that each Hinds County beat should elect one Senator.

"The District Court did not explain its preference for the Hinds County Board of Supervisors' plan, although it did note generally that "we have had to take the Counties, Beats, and [voting] precincts as they actually are." There is, however, no longstanding state policy mandating separate representation of individual beats in the legislature.[25] And there is no practical barrier

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[24]The validity of these justifications for apportionment of the supervisor beats is currently under attack in Kirksey v. Board of Supervisors of Hinds County, supra, pending in the Court of Appeals for the Fifth Circuit after reargument en banc. Our discussion of the Hinds County Senate districting problem is not to be understood as pretermitting that court's consideration of the county supervisor districting issue raised in the Kirksey litigation.

[25]Unlike counties with "boundaries . . . fixed by statute for generations," beats are not units of state government, and their boundaries are frequently changed by the Boards of Supervisors. According to the District Court, "Beat lines generally follow governmental land lines as laid down by section, township, and range-in other words invisible to all and unknown to most. It is a rare individual who knows where a beat line is at any given point. . . ." Connor v. Johnson, 330 F. Supp., at 518.

that requires apportioning a large county on the basis of beat lines; Mississippi's 410 beats are in turn divided into 2,094 voting precincts, each of which is sufficiently small as the basic voting unit to allow considerable flexibility in putting together legislative districts. On this record, neither custom nor practical necessity can thus be said to justify reliance for State senatorial districting purposes upon the beats adopted by the Hinds County Board of Supervisors to govern their own election.

* * *

"Such unexplained departures from the results that might have been expected to flow from the District Court's own neutral guidelines can lead, as they did here, to a charge that the departures are explicable only in terms of a purpose to minimize the voting strength of a minority group. The District Court could have avoided this charge by more carefully abiding by its stated intent of adopting reasonably contiguous and compact districts, and by fully explaining any departures from that goal.

"Twelve years have passed since this litigation began, but there is still no constitutionally permissible apportionment plan for the Mississippi Legislature. It is therefore imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges.[26] In view of the serious questions raised concerning the purpose and effect of the present decree's unusually shaped legislative districts in areas with concentrations of

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[26]The District Court did take a substantial step forward in its final decree by eliminating multimember districts. In setting aside this decree we do not mean to obscure the significance of that advance. Although the Court's order to hold special elections in two districts to make more immediately available the fruits of its decree cannot be affirmed in the face of our judgment today that vacates the entire decree, the District Court will retain the power to order such special elections on remand as the circumstances may require or permit.

Negro population, the District Court on remand should either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished." (45 U.S.L.W. at 4532-33) (Emphasis added.)

I am enclosing 15 copies of this letter for distribution to the Judges of the Court. Thank you for your consideration in this matter.

Yours very truly,

Frank R. Parker

Frank R. Parker
Attorney for Plaintiffs-Appellants

FRP:ljh
Enclosures (15)
cc: Thomas H. Watkins
Attorney for Defendants-Appellees

Jessica Dunsay Silver
Attorney for the United States
as Amicus Curiae

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2212

U. S. COURT OF APPEALS
FILED
OCT 25 1977
EDWARD W. WADSWORTH
CLERK

HENRY J. KIRKSEY, ET AL., Individually, and on behalf of all others similarly situated,

Plaintiff-Appellants,

versus

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING

(July 22 , 1977)

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

United States Circuit Judge

*Because of illness Judges Wisdom and Thornberry did not participate in the hearing or in the consideration of this case.

APPENDIX "C"